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In the Supreme Court of the United States

OCTOBER TERM, 1956

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
1. The background of this litigation	5
(a. The corporate organization of the Panama Canal Company	5
(a. The corporate organization of the Panama Canal	8
(b. The authority to prescribe tolls for the Panama Canal and the Panama Canal Company	11
(c. The dispute between the Comptroller General	
2. The proceedings in the District Court	16
3. The decision of the Court of Appeals	18
4. The scope of the decision below, and the applications to stay the proceedings pending review in this Court	20
Reasons for granting the writ	21
Conclusion	41
Appendix	42

CITATIONS

Cases:

Alabama v. *Texas*, 347 U.S. 272	23
Alabama Power Co. v. *Ickes*, 302 U.S. 464	25
Associated Industries v. *Ickes*, 134 F. 2d 694, vacated as moot, 320 U.S. 707	24, 27
Benson v. *Schofield*, 236 F.2d 719, certiorari denied, 352 U.S. 976	26
Biggs v. *Ward*, 212 F. 2d 209	35
Butte City Water Co. v. *Baker*, 196 U.S. 119	23
Central Kentucky, etc. v. *Railroad Commission*, 290 U.S. 264	27
Chicago, B. & Q. Ry. Co. v. *Babcock*, 204 U.S. 585	28
Chicago & Southern Air Lines v. *Waterman S.S. Corp.*, 333 U.S. 103	28, 36
Columbia Broadcasting System v. *United States*, 316 U.S. 407	26

Cases—Continued

	Page
Covington & Cincinnati Bridge Co. v. Hager, 203 U.S. 109	35
Decatur v. Paulding, 14 Pet. 497	33, 34
Duncan Townsite Co. v. Lane, 245 U.S. 308	36
Employers' Group, etc. v. National War Labor Board, 143 F. 2d 145	28
Federal Crop Insurance Co. v. Merrill, 332 U.S. 380	31
Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95	31
Fountain v. Filson, 336 U.S. 681	33
Graves v. N.Y. ex rel. O'Keefe, 306 U.S. 466	31
Inland Waterways Corp. v. Young, 309 U.S. 517	31
Insular Police Commission v. Lopez, 160 F. 2d 673	35
Interstate Commerce Commission v. Humboldt S.S. Co., 224 U.S. 474	34
Iowa-Illinois Gas & Electric Co. v. Benson, No. 13570 (C.A.D.C., decided February 28, 1957), now pending on petition for a writ of certiorari, No. 1036, October Term, 1956	26
Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123	27
Kaku Nagano v. McGrath, 187 F. 2d 759, aff'd, 342 U.S. 916	33
Kansas City Power & Light Co. v. McKay, 225 F. 2d 924, certiorari denied, 350 U.S. 884	23, 24, 25, 26
Keim v. United States, 177 U.S. 290	33
Knapp v. Lake Shore and Michigan Southern Ry. Co., 191 U.S. 536	35
Light v. United States, 220 U.S. 523	23
McIntire v. Wood, 7 Cranch 504	35
Marbury v. Madison, 1 Cranch 137	33, 34
Marshall v. Crotty, 185 F. 2d 622	35
Miguel v. McCarl, 291 U.S. 442	36
Mitchell v. Covington Mills, 229 F. 2d 506, certiorari denied, 350 U.S. 1002	26
Newton v. Consolidated Gas Co., 258 U.S. 165	27
N.Y. ex rel. Rogers v. Graves, 299 U.S. 401	31
Perkins v. Lukens Steel Co., 310 U.S. 113	24, 25, 26, 28, 41
Petrowski v. Nutt, 161 F. 2d 938, certiorari denied, 333 U.S. 842	35
Rosenbaum v. Bauer, 120 U.S. 450	35
Skinner & Eddy Corp., ex parte, 265 U.S. 86	36
Skiriotes v. Florida, 313 U.S. 69	24

Cases—Continued

	Page
Smith v. *Bourbon County*, 127 U.S. 105	36
Stark v. *Wickard*, 321 U.S. 288	24, 25, 28
Stevenson v. *Holstein Friesian Ass'n*, 30 F. 2d 625	36
Switchmen's Union v. *National Mediation Bd.*, 320 U.S. 297	28
Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426	27
United States v. *Dern*, 289 U.S. 352	36
United States v. *George S. Bush & Co., Inc.*, 310 U.S. 371	28
United States v. *Midwest Oil Co.*, 236 U.S. 459	23
United States v. *Public Utilities Commission*, 151 F. 2d 609	27
United States v. *Rock Royal Co-op.*, 307 U.S. 533	28
United States v. *San Francisco*, 310 U.S. 16	23
United States ex rel. Chicago Great Western R.R. Co. v. *Interstate Commerce Commission*, 294 U.S. 50	34
United States ex rel. Dunlap v. *Black*, 128 U.S. 40	33
United States ex rel. Vassel v. *Durning*, 152 F. 2d 455	35
United States Overseas Airlines v. *Civil Aeronautics Board*, 222 F. 2d 303	29
Updegraff v. *Talbott*, 221 F. 2d 342	28, 35
Virginian Ry. v. *System Federation No. 40*, 300 U.S. 515	34, 36
Warner Valley Stock Co. v. *Smith*, 165 U.S. 28	36
Whitehouse v. *Illinois*, 349 U.S. 366	36
Wilbur v. *United States*, 281 U.S. 206	34, 35
Williamsport Wire Rope Company v. *United States*, 277 U.S. 551	28
Work v. *Rives*, 267 U.S. 175	33
Youngblood v. *United States*, 141 F. 2d 912	36

Constitution, Statutes and Treaty:

Constitution of the United States:	
Article III, Section 2	25, 33
Article IV, Section 3	23
Act of August 24, 1912:	
Sec. 3 (37 Stat. 561)	6
Sec. 5 (37 Stat. 562)	8
Act of June 15, 1914, 38 Stat. 385	8

Statutes and Regulations—Continued

	Page
Act of June 29, 1948, 62 Stat. 1075	4, 6, 7
Act of September 26, 1950, 64 Stat. 1038, 31 U.S.C. 846, Section 2a(2)	4, 5, 7
Administrative Procedure Act:	
Section 10	4
Section 10(a)	25
Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. 74, Section 304	39
Canal Zone Code, Title 2, as amended by the Act of June 29, 1948, 62 Stat. 1075, and the Act of September 26, 1950, 64 Stat. 1038	2, 7, 19
Sec. 245	6, 7
Sec. 246(a)	7
Sec. 246(b)	15
Sec. 246(d)	34
Sec. 247	7
Sec. 248(d)	7
Sec. 249	7
Sec. 253	34
Sec. 255	34
Sec. 411	2, 10, 18, 22, 24, 29, 34
Sec. 412	3, 10, 18, 20, 23, 24
Sec. 412(b)	10, 13, 14, 16
Civil Aeronautics Act	29
Defense Production Act Amendments, 1952, Title III, Section 301, 66 Stat. 308, 41 U.S.C. 43a	24
Department of Commerce and Related Agencies Appropriation Act for 1956, 69 Stat. 235-237	15
Department of Commerce and Related Agencies Appropriation Act for 1957, 70 Stat. 322-324	15
Department of Commerce and Related Agencies Appropriation Act for 1958, 71 Stat. 78	15
George Act, approved February 24, 1945, 59 Stat. 6, Section 5	39
Government Corporation Control Act:	
Sec. 2 (59 Stat. 597, 31 U.S.C. 841)	37
Sec. 101 (59 Stat. 597, 31 U.S.C. (1946 Ed.) 846)	6, 7
Sec. 102 (31 U.S.C. 847)	37
Secs. 102-104 (59 Stat. 598, 31 U.S.C. 847-849)	23
Sec. 103 (31 U.S.C. 848)	38

Statutes and Regulations—Continued

	Page
Sec. 104, as amended, (31 U.S.C. 849)	38
Sec. 105 (59 Stat. 599, 31 U.S.C. 850)	4, 11, 38
Sec. 106 (59 Stat. 599, 31 U.S.C. 851)	4, 12, 38
Sec. 304(b) (59 Stat. 602, 31 U.S.C. 869)	6
Rural Electrification Act	26
Hay-Pauncefote Treaty, 32 Stat. (Pt. 2) 1903	19

Miscellaneous:

Changes in the Administration of the Panama Canal, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess. on H.R. 6917, etc., p. 21	37
Comptroller General's Audit Report for 1954, transmitted to Congress on May 16, 1955	15, 16
Conference Report on the Civil Functions Appropriations Bill, 1954, H. Rept. 889, 83rd Cong., 1st Sess., p .10	11
92 Cong. Rec. 2153	25
96 Cong. Rec. 13375	11
100 Cong. Rec. (Daily Ed.) A. 1995	11, 15
100 Cong. Rec. (Daily Ed.) A. 1996	8, 9
Encyclopedia Britannica, Vol. 17, pp. 173-174	8
Federal Rules of Civil Procedure:	
Rule 12(b)(1)-(5)	33
Rule 12(b)(6)	33
Rule 12(b)(7)	33
Hearings on the Department of Commerce and Related Agencies Appropriations for 1957, House of Representatives, 84th Cong., 2d Sess.:	
p. 691, 696-697	40
Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 81st Cong., 2d Sess. on H.R. 8677, pp. 43, 86-87	29
H. Doc. 460, 81st Cong., 2d Sess.:	
p. 6	9
p. 8	9
p. 11, 16	29

Miscellaneous—Continued

	Page
H. Doc. 160, 84th Cong., 1st Sess.	4, 12
p. 2	11
p. 4	7
pp. 8-9	13
p. 14	13
p. 16	13
H. Doc. 465, 84th Cong., 2d Sess.	12
H. Rept. 856, 79th Cong., 1st Sess.:	
p. 7	39
p. 8	39
H. Rept. 2396, 80th Cong., 2d Sess., pp. 1-2	7
H. Rept. 1304, 81st Cong., 1st Sess., p. 4	9
H. Rept. 1345, 83rd Cong., 2d Sess., p. 12	40
H. Rept. 603, 84th Cong., 1st Sess., p. 10	40
H. Rept. 2076, 84th Cong., 2d Sess., p. 10	40
H. (Conference) Rept. 2344, 84th Cong., 2d Sess., pp. 3, 6	40
Legislative History of the Administrative Procedure Act, S. Doc. 248, 79th Cong., 2d Sess., p. 310	25
Moore, *Federal Practice* (2d Ed.), Vol. 2, Section 12.09, pp. 2247-2257	33
Operations of the Panama Canal Company, Hearings before Subcommittee No. 3, Panama Canal, Committee of Merchant Marine and Fisheries, House of Representatives, 83rd Cong., 2d Sess., pp. 8-10	13
Panama Canal (Changes in Administration), Hearings before the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess. on S. 2167:	
p. 68-70	13
p. 70	16
Sen. Doc. 227, 78th Cong., 2d Sess., p. 20	9
S. Rept. 694, 79th Cong., 1st Sess.:	
p. 7	39
p. 9	39
S. Rept. 1401, 80th Cong., 2d Sess., pp. 1-2	7
S. Rept. 2531, 81st Cong., 2d Sess., p. 5	11
S. Rept. 1373, 83rd Cong., 2d Sess., p. 26	40
S. Rept. 2039, 84th Cong., 2d Sess., p. 7	40

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v.

GRACE LINE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Panama Canal Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on April 8, 1957.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dated June 28, 1956 (Pl. App. 165a-187a),[1] is reported at 143 F. Supp. 539. The opinion of the United States Court of Appeals for the Second Circuit, dated April 8, 1957[2] (Appendix *infra*, pp. 42-67), has not yet been reported.

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[1] "Pl. App." refers to the Appendix to the plaintiffs-appellants' (respondents') brief filed in the Court of Appeals. "Def. App." refers to the Appendix to defendant-appellee's (petitioner's) brief filed in that court.

[2] By Chief Judge Clark, for himself and Circuit Judge Hincks. Judge Frank's death occurred after the argument of the case.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1957 (Appendix, *infra*, pp. 67-68). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether American shipowners and operators may by mandamus compel petitioner, a Government agency, to prescribe new and lower Panama Canal tolls when that determination involves questions of discretion and business judgment in respect of an internal fiscal matter of the Government, and requires the approval of the President.

2. Whether Sections 105 and 106 of the Government Corporation Control Act impose upon a Government corporation the ministerial duty to comply with the conclusions regarding accounting, cost allocation, and statutory interpretation reached by the Comptroller General in his commercial-type audit report.[3]

STATUTES INVOLVED

1. Canal Zone Code, Title 2, Sections 411 and 412, as amended by the Act of September 26, 1950, 64 Stat. 1038, provide in pertinent part:

> 411. AUTHORITY TO PRESCRIBE MEASUREMENT RULES AND TOLLS.—The Panama Canal Company

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[3] If the writ of certiorari is granted, we shall also raise the following questions briefly touched upon in this petition:

1. Whether the district courts outside the District of Columbia have jurisdiction to grant mandatory relief.

2. Whether, considering that only petitioner's motion to dismiss the complaint for lack of jurisdiction was *sub judice*, the Court of Appeals erred in granting respondents' motion for summary judgment, to which petitioner has not filed any answering affidavits.

is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.

412. * * *

(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross reve-

nues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

2. Section 10 of the Administrative Procedure Act and the Acts of June 29, 1948, 62 Stat. 1075, and September 26, 1950, 64 Stat. 1038, are set forth in Def. App., pp. 4a-23a.

STATEMENT

These proceedings, brought by a large number of American shipping companies using the Panama Canal (Pl. App. 2a, 3a), are designed to compel petitioner, the Panama Canal Company, (a) to prescribe new tolls for the use of the canal, (b) to base its computations upon accounts no less favorable to respondents than those used by the General Accounting Office, and (c) to refund tolls allegedly illegally collected in the past, claimed to amount to more than $27,000,000.00 (Pl. App. 7a-9a).

Respondents base their complaint upon certain statements in the Comptroller General's audit report for 1954 [4] of the Panama Canal Company [5] which are crit-

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[4] H. Doc. 160, 84th Cong., 1st Sess. For pertinent parts of this report see Def. App. 30a-43a.

[5] Inasmuch as petitioner is a wholly owned government corporation (*infra*, p. 6, fn. 10, 7), its financial transactions are subject to an annual business-type audit by the General Accounting Office. The Comptroller General submits a report of this audit to Congress. Government Corporation Control Act, Sections 105, 106, 59 Stat. 599, 31 U.S.C. 850, 851.

ical of some of petitioner's accounting practices.[6] The broad question presented by this litigation is whether the ultimate responsibility for the rate of Panama Canal tolls lies with petitioner and the President, as provided for in the Canal Zone Code,[7] or with the Comptroller General—particularly whether, in the event of a disagreement between petitioner and the Comptroller General, the courts, at the suit of financially interested corporations may step into this intra-governmental dispute and direct petitioner to conduct its affairs in accord with the Comptroller General's theories. We believe that a fairly detailed account of the statutes governing petitioner's corporate status and those determining the tolls of the Panama Canal will assist in the exposition of the specific questions in the case.

1. The Background of This Litigation

a. *The corporate organization of the Panama Canal Company*

Petitioner was created in 1950[8] by the transfer of the assets of the Panama Canal and of the functions of operating and maintaining it to the Panama Railroad Company and by the change of the latter's name to Panama Canal Company. Prior to 1950, the Panama

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[6] Par. 10 of the Complaint alleges that the accounts determinations are final and conclusive on petitioner, but not on respondents (Pl. App. 4a). Par. 3 of respondents' motion for summary judgment states that it is based on the Comptroller General's audit report of petitioner's affairs for the fiscal year ended June 30, 1954 (Pl. App. 16a). Similarly, the grant of summary judgment by the Court of Appeals is comprehensible only on the theory that it considered the factual issues irrefutably determined by the Comptroller General's report (see *infra*, pp. 31-32, 37).

[7] Title 2, Section 411, *supra*, pp. 2-3.

[8] Act of September 26, 1950, 64 Stat. 1038 (Def. App. 14a-23a).

Canal was maintained and operated by the President through the Governor of the Canal Zone.[9] Certain business operations supporting the maintenance and operation of the Canal, however, were conducted by the Canal's adjunct, the Panama Railroad Company.[10] These supporting business operations included the railroad across the Isthmus of Panama, a steamship line operating between the port of New York and the canal, docks, harbor terminals and coaling plants for ships on the Isthmus, commissary stores supplying employers and ships, dry and cold storage plants for supplies, two

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[9] Act of August 24, 1912, Section 3, 37 Stat. 561.

[10] The Panama Railroad Company was incorporated in 1849 under the laws of New York. Its entire capital stock was acquired by the United States during the construction of the Panama Canal. In 1945, it was designated a wholly owned Government corporation. Section 101 of the Government Corporation Control Act, 59 Stat. 597, 31 U.S.C. (1946 Ed.) 846. In view of Section 304(b) of the Government Corporation Control Act (59 Stat. 602, 31 U.S.C. 869), providing that no wholly owned Government corporation shall operate after June 30, 1948, as an agency or instrumentality of the United States unless incorporated by act of Congress, the Act of June 29, 1948, 62 Stat. 1075 (Def. App. 5a-13a) conferred a federal charter on the Panama Railroad Company as "an agency and instrumentality of the United States, and as an adjunct of the Panama Canal," "[f]or the purpose of conducting business operations incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal." Canal Zone Code, Title 2, Section 245 (Def. App. 6a).

The statement in the opinion of the Court of Appeals (*infra*, p. 45) that the Act of June 29, 1948, was passed in order to subject the original Panama Railroad Company to the controls provided in the Government Corporation Control Act is not wholly correct. As we have shown, the Government Corporation Control Act covered the Panama Railroad Company from the day of its enactment in 1945 and the purpose of the 1948 Act, as expressed in its first section (Def. App. 5a), was to comply with the requirement of Section 304(b) of the Government Corporation Control Act that all wholly owned Government corporations should be incorporated under federal law.

hotels, and the telephone system of the Canal Zone. Congressional committees found that these business operations were "essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise."[11]

By statute, petitioner is "an agency and instrumentality of the United States" created "for the purposes of maintaining and operating the Panama Canal and of conducting business operations incident to such maintenance and operation and incident to the civil government of the Canal Zone"; [12] it is a wholly owned Government corporation within the meaning of Section 101 of the Government Corporation Control Act.[13] Its stock is held by the President of the United States, or his designee called the "stockholder" (Canal Zone Code, Title 2, Section 246 (a)),[14] who appoints the directors of the Company to hold office at his pleasure.[15] The corporation has capacity to sue and be sued.[16]

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[11] H. Rept. No. 2396, 80th Cong., 2d Sess., pp. 1-2; S. Rept. No. 1401, 80th Cong., 2d Sess., pp. 1-2.

[12] Canal Zone Code, Title 2, Section 245, as amended, 64 Stat. 1041 (Def. App. 19a). Petitioner's corporate status is based on the Act of June 29, 1948, incorporating the Panama Railroad Company under federal law (*supra*, p. 6, fn. 10; Def. App. 5a-13a) and the Act of September 26, 1950 (Def. App. 14a-23a). Both Acts amend Title 2 of the Canal Zone Code.

[13] 59 Stat. 597, as amended by the Act of September 26, 1950, Section 2a(2), 64 Stat. 1038, 31 U.S.C. 846.

[14] Def. App. 6a-7a. At present, the Secretary of the Army is the designated stockholder. H. Doc. 160, 84th Cong., 1st Sess., p. 4 (Def. App. 35a).

[15] Canal Zone Code, Title 2, Section 247 (Def. App. 8a-9a).

[16] Canal Zone Code, Title 2, Section 248(d) (Def. App. 9a). Other portions of Sections 248 and 249 (Def. App. 9a-11a), however, reserve important incidents of sovereignty to the Panama Canal Company.

b. *The authority to prescribe tolls for the Panama Canal*

Prior to 1950, the President of the United States was authorized "to prescribe and from time to time change" the canal tolls upon six months' notice.[17] The original basic toll rate prescribed in 1912 was $1.20 per net vessel ton of 100 cubic feet of actual earning capacity.[18]

This 1912 toll rate continued in effect until 1937, a period of 25 years, when the President reduced the rate to 90¢ per net vessel ton.[19] The 90¢ toll rate, which has been continued until the present time, is that which respondents now contend to be excessive. This reduction in tolls, during the 45 years since the Canal was opened in 1912, has come about in spite of the very material increases in the value of vessels and cargoes transiting the Canal, in freight and passenger rates of such vessels, and in the operating costs of the Canal. Our traditional Panama toll policy has been, as in the case of the Suez Canal, one of maintaining reasonably constant, if not permanent, rates.

Since the repeal in 1914[20] of the discriminatory legislation fostered by our shipping interests in favor of American coastwise commerce, tolls have been uniform and nondiscriminatory. No foreign government has ever claimed the tolls were inequitable, unjust, or ex-

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[17] Act of August 24, 1912, Section 5, 37 Stat. 562.

[18] 100 Cong. Rec. (Daily Ed.) A.1996 (Def. App. 27a-28a).

[19] This change was accompanied by the abolition of an alternative method of measurement more favorable to the shipowners. 100 Cong. Rec. (Daily Ed.) A.1996 (Def. App. 28a-29a); *Encyclopedia Britannica*, Vol. 17, pp. 173-174, Panama Canal Administration and Finance.

[20] Act of June 15, 1914, 38 Stat. 385.

cessive. There has been substantial congressional criticism that the tolls were inadequate,[21] but no member of Congress has ever claimed that the tolls were excessive.

Although President Truman prescribed in 1948 an increase in the toll rate to the then statutory maximum of $1.00 per net vessel ton, at the request of Congress —prompted by the protests of the shipping industry[22] —the President postponed, and finally cancelled, this rate increase and submitted a report and recommendation of the Bureau of the Budget with respect to the organization and operation of the Panama Canal and Panama Railroad Company. This report (H. Doc. 460, 81st Cong., 2d Sess.) furnished the basis of the Act of September 26, 1950 (*supra*, p. 5, fn. 8).[23]

The 1950 statute was based on the expectation that an increase in the canal tolls might be avoided, at least in part, if the Panama Canal were operated by a business-type management and if the Panama Railroad Company, which in the past had made a profit,[24] could be made to contribute to the cost of the civil government of the Canal Zone from which it had hitherto been exempted.[25] Congress also noted that, in the process of determining canal tolls, the President did not have any opportunity to consult with any qualified rate-making authority (H. Rept. 1304, 81st Cong., 1st Sess., p. 4).

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[21] Between 1912 and 1949, the Government claimed it had sustained an accumulated deficit of $99,000,000 from the operation of the Panama Canal and its affiliated commercial operations.

[22] *Infra*, p. 45; see also H. Rep. No. 1304, 81st Cong., 1st Sess., p. 4.

[23] 100 Cong. Rec. (Daily Ed.) A.1996 (Def. App. 29a-30a).

[24] Sen. Doc. 227, 78th Cong., 2d Sess., p. 20; H. Doc. 460, 81st Cong., 2d Sess., p. 6.

[25] H. Doc. 460, 81st Cong., 2d Sess., p. 8.

In order to carry out those objectives Congress not only merged the function of operating and maintaining the canal with those of the Panama Railroad Company, but also amended Sections 411 and 412 of Title 2 of the Canal Zone Code dealing with the methods of prescribing tolls and the toll formula. The new Section 411 (*supra*, pp. 2-3) authorizes the petitioner "to prescribe, and from time to time change", the tolls for the use of the Panama Canal. If the petitioner proposes a change, it shall give six months' notice by publication in the Federal Register. Public hearings are to be conducted during this interval. Any change in the tolls, however, "shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive." Section 411 also provides that the tolls prevailing at the time of its enactment shall remain in effect until changed pursuant to the procedures set forth in that section.

Section 412(b), *supra*, pp. 3-4, contains the formula pursuant to which the petitioner shall compute the tolls. It provides that the tolls shall be calculated to cover *as nearly as practicable* all costs of maintaining and operating the canal *together with the related facilities and appurtenances* including interest and depreciation, and an *appropriate share* of the cost of the Canal Zone Government. The statute further directs that in the computation of this "appropriate share" substantial weight is to be given

> * * * to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising

from transactions within the said corporation or from transactions with the Canal Zone Government.

When Congress enacted this legislation reorganizing the corporate and administrative set-up of the Panama Canal, Congress believed that, while it would not prevent completely an increase in the tolls, it would, at least, limit the extent thereof. It was generally expected that under the new formula the tolls would rise from 90¢ to 95¢ or even $1.00 per net vessel ton.[26] In fact, in the summer of 1953, Congress directed the Panama Canal Company to complete its current study regarding the *adequacy* of the canal tolls.[27] In its reply to this directive, the Company set forth its methods of determining whether or not new tolls should be prescribed. It explained that it was observing and evaluating continuously whether the current rates were proper and should be maintained or whether an adjustment was required, and that new tolls would be proposed whenever the Company should conclude that changes in rates were indicated and necessary.[28]

c. The dispute between the Comptroller General and the Panama Canal Company

The Comptroller General's reports on the Panama

[26] Sen. Rept. 2531, 81st Cong., 2d Sess., p. 5; 96 Cong. Rec. 13375. See also H. Doc. 160, 84th Cong., 1st Sess., p. 2 (Def. App. 32a-33a), and see the further detailed references in the opinion of the district court (Pl. App. 172a-173a, fn. 16-17).

[27] See Statement of the Managers on the Part of the House, accompanying the Conference Report on the Civil Functions Appropriations Bill, 1954, H. Rept. 889, 83rd Cong., 1st Sess., p. 10.

[28] 100 Cong. Rec. (Daily Ed.) A.1995 (Def. App. 24a-27a).

Canal Company [29] for the years of 1954 [30] and 1955 [31] expressed the view that the Panama Canal Company had allocated to the canal operations too high a share of the cost of the Canal Zone Government, corporate overhead, and interest payments, and an inadequate one to the supporting activities, most of which formerly had been administered by the Panama Railroad Company. According to the Comptroller General's method of cost allocation, the canal operations showed a large surplus, the supporting activities a commensurate deficit.[32] The Comptroller General also claimed that the prices charged by the supporting activities were inadequate because petitioner failed to include among the recoverable cost elements an appropriate share in the cost of the Canal Zone Government.

Having determined that by his method of cost allocation the canal operations resulted in a large surplus and those of the supporting operations in a considerable loss, the Comptroller General was of the view that under his interpretation of Section 412(b) the canal

[29] As noted above, pursuant to Section 105 of the Government Corporation Control Act (59 Stat. 599, 31 U.S.C. 850) the financial transaction of all wholly owned Government corporations are subject to an annual audit by the General Accounting Office in "accordance with the principles and procedures applicable to commercial corporate transactions". Under Section 106 of that Act (59 Stat. 599, 31 U.S.C. 851) the Comptroller General shall report on this audit to Congress with "such comments and information as may be deemed necessary to keep Congress informed of the operations and financial condition of the several corporations, together with such recommendations with respect thereto as the Comptroller General may deem advisable * * *".

[30] H. Doc. 160, 84th Cong., 1st Sess. Relevant parts of this report may be found at Def. App. 30a-43a.

[31] H. Doc. 465, 84th Cong., 2d Sess. Relevant parts of this report may be found at Def. App. 44a-56a.

[32] The Comptroller General's theories concerning the proper allocation of expenses to the petitioner's several activities, of course, did not affect petitioner's over-all profit or loss.

tolls had to be computed exclusively on the basis of the cost of operating the canal without reference to the losses incident to its supporting operations—and thus would have to be lowered considerably. He agreed, however, that this result was financially and economically unsound because the losses of the supporting activities, which he conceded to be essential to the operation of the canal and to the maintenance of its personnel, were largely attributable to fringe benefits to the canal employees and to its users, and thus actually constituted a legitimate element of the canal's cost of operations.[33] The Comptroller General also realized that under his reading of the statute this deficit of the supporting activities could not be met out of canal tolls, and funds would have to be appropriated by Congress to cover it. This meant, of course, that the canal users, more than half of which are of foreign registry, would receive a substantial subsidy at the expense of the American taxpayers. He, therefore, recommended legislation amending Section 412(b) to provide specifically that any losses of the supporting activities should be included in the cost basis for the determination of the canal tolls.

Petitioner has taken vigorous issue with the audits and reports of the Comptroller General.[34] It considers

[33] H. Doc. 160, 84th Cong., 1st Sess., pp. 8-9, 14, 16, (Def. App. 36a, 40a).

[34] Inasmuch as the Court of Appeals decided the merits of the case before the issue was joined (see *infra*, pp. 16-18), the position taken by the petitioner on this score has not been incorporated in the formal record. Petitioner's interpretation of the accounting and statutory problems, however, is a matter of public knowledge. See, *e.g.*, *Operations of the Panama Canal Company*, Hearings before Subcommittee No. 3, Panama Canal, Committee on Merchant Marine and Fisheries, House of Representatives, 83rd Cong., 2d Sess., pp. 8-10; *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on

his cost allocation methods and conclusions to be in conflict with sound business and accounting practices and without any legal foundation.[35] Petitioner objects particularly to the Comptroller General's view that the statute requires the computation of toll rates without regard to any deficit in the operation of the supporting business activities. In contrast to the Comptroller General, who realized that his reading of the statute resulted in an economic absurdity and therefore recommended that Section 412(b) be amended, petitioner takes the position that this unreasonable result (which follows from the Comptroller's reading of the statute) cannot possibly represent the true congressional purpose and thus that no correction of the toll formula is needed.[36]

Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess., on S. 2167, pp. 68-70. See also the letter dated June 1, 1955, from the President of the Panama Canal Company to the Comptroller General commenting on the Audit Report for 1954, Appendix, *infra*, pp. 68-75.

[35] Petitioner's position, briefly, is that the statute does not require the allocation of corporation overhead and interest to the supporting business activities, and that the statutory phrase of Section 412(b) that in the allocation of the cost of the Canal Zone Government "substantial weight shall be given to the ratio * * *" (*supra*, p. 10) does not require the use of a strictly mathematical ratio but that consideration has to be given to business and economic realities. These facts, among others, are that any substantial increase in the charges of the supporting activities will either price them out of the market (and thus create actual, as distinguished from accounting, deficits under the economic laws of diminishing returns) (*infra*, p. 73) or require the payment of higher cost of living allowances to canal employees and thereby directly increase the cost of operating the canal.

[36] Petitioner considers the maintenance and operation of the Panama Canal as its primary and sole operational mission under its charter. In its opinion, the supporting business activities are maintained only in order to contribute to the performance of that mission. Accordingly, any deficit incurred by the supporting activities constitutes a cost element in the canal operations which is

On the basis of its own methods of cost allocation, its own business judgment, and its own interpretation of the statute, petitioner concludes that the tolls currently charged comply with the statutory toll formula and that toll changes are neither "indicated" nor "necessary".[37] This conclusion is also supported by uncertainties with respect to a number of items. Interest and depreciation cannot even be determined prior to the completion of the valuation of petitioner's assets;[38] apart from this, some elements in the cost of operations, such as the annuity payable to Panama and the wages payable to employees, are bound to rise (Pl. App. 155a-161a).[39]

The Comptroller General's Report for 1954 was transmitted to Congress on May 16, 1955.[40] Since then, Congress has approved the Department of Commerce and Related Agencies Appropriation Acts for 1956, 1957, and 1958, which include the budgets of the Panama Canal Company for those years based upon petitioner's interpretation of the statute and its methods of accounting and cost allocation.[41] On the other hand, Congress has not enacted S. 2167, 84th Cong., 2d Sess.,

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recoverable under the toll formula of Section 412(b). Cf. the documents referred to in fn. 34, *supra*, and *infra*, p. 71.

[37] Cf. 100 Cong. Rec. (Daily Ed.) A.1995 (Def. App. 24a, 25a).

[38] The statement of the Court of Appeals that this valuation has been completed (*infra*, p. 57) is based upon a misunderstanding. While the Panama Canal Company has completed the appraisal, the approval by the Bureau of the Budget, required by Canal Zone Code, Title 2, Section 246(b) (Def. App. 7a-8a), has not yet been obtained.

[39] The Comptroller General's Report for 1954 fully recognized these uncertainties. It concedes that its own figures were only tentative (Def. App. 32a), and that the Panamanian Treaty and the expected increased benefits to employees will create additional financial burdens and uncertainties (Def. App. 41a-42a).

[40] Def. App. 30a.

[41] 69 Stat. 235-237, 70 Stat. 322-324, 71 Stat. 78.

a bill containing the amendments to Section 412(b) proposed by the Comptroller General.[42]

2. The Proceedings in the District Court

On September 13, 1955, *i.e.*, within four months after the Comptroller General's Report for 1954 had been submitted to Congress, respondents filed their complaint, alleging in substance that the canal tolls were excessive, as evidenced by the Comptroller General's report, and praying for judgment requiring petitioner (a) to prescribe new tolls on the basis of the accounts proposed by the General Accounting Office, and (b) to refund the allegedly excessive tolls collected in the past. Six weeks later, before petitioner's 60 day time to answer had expired, respondents moved for summary judgment. The motion, based on Section 412(b) and the Comptroller General's Report for 1954 (Pl. App. 16a), is a heavy printed tome of nearly 60 pages of affidavits and of over 500 pages of congressional and administrative documents, hearings and reports.[43] In

[42] This failure may well have been prompted by petitioner's argument that no amendment was necessary because a deficit in the supporting business activities constituted an element in the cost of operating the canal and thus had to be considered under the existing cost formula of Section 412(b). *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess., on S. 2167, p. 70.

[43] The motion asked for a judgment containing, among others, the following provisions:

1. Declaring the duty of defendant to proceed forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

2. Enjoining and restraining the defendant from further unlawfully withholding and unreasonably delaying the prescription of tolls as provided by Section 12, Public Law 841, 81st Congress, the proposal of changes in tolls as indicated by said

spite of the pendency of their motion for summary judgment, respondents also instituted extensive discovery proceedings.

Petitioner moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to join the United States as an indispensable party,[44] and for a stay of all other proceedings pending the determination of its motion to dismiss (Pl. App. 149a). The District Court granted this stay (Pl. App. 163a-164a) and stressed that in passing on the motion to dismiss it would concern itself only with the question whether it had jurisdiction to hear the case, and that the only answer it would give the parties would be either that it could not entertain the proceedings at all, or that it could, in which case there would "be a fresh slate and a fresh start" (Pl. App. 162a). In these circumstances, petitioner refrained from submitting affidavits and other materials controverting the allegations and data contained in the motion for summary judgment.

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prescription and the conduct of a public hearing, all according to law;

3. Commanding and directing the defendant forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

4. Enjoining and restraining the defendant in the prescription of tolls from using accounts less favorable to the plaintiffs and their class than those determined by the General Accounting Office;

5. Retaining jurisdiction of the cause so as to issue appropriate orders and decrees that the defendant prescribe tolls, propose changes in tolls and conduct a public hearing according to law; * * * [Pl. App. 12a].

[44] This motion was supported by an affidavit addressed to issues related to petitioner's claim that the court lacked jurisdiction, but not to the merits of the controversy (Pl. App. 150a-161a).

The District Court dismissed the complaint for lack of jurisdiction (Pl. App. 165a-187a).[45] It held that Sections 411 and 412 conferred upon petitioner the discretionary power and duty to determine the time when in its judgment new tolls should be prescribed, and that this function was by no means of a ministerial nature. In addition, the District Court took the position that, inasmuch as any new tolls determined by petitioner had to be approved by the President, petitioner's rate-making activities constituted advice to the President and were not subject to judicial review, and that, in any event, respondents lacked standing to sue because the Canal Zone Code did not confer upon them any private legal right. With respect to the demand for a refund of tolls, the court held that the action was in effect one against the President and against the United States, and thus could not be maintained.

3. The Decision of the Court of Appeals

The Court of Appeals affirmed the decision of the District Court to the extent that it denied the demand for a refund. In all other respects, however, it reversed the District Court and directed that summary judgment be entered for the plaintiffs. This was done although the District Court had never passed on the plaintiffs' motion for summary judgment, and petitioner never had an opportunity to challenge that motion on the merits.

After conceding that the interpretation placed by petitioner on the statute "was reasonable from the naked words" of the statute (*infra*, p. 53), the Court

[45] We cannot find any basis for the statement by the Court of Appeals (*infra*, p. 44) that the District Court had granted summary judgment for petitioner.

of Appeals determined the merits of the case, accepted the position of the Comptroller General, and took the allegations of the complaint and those of the motion for summary judgment at their face value (*infra*, pp. 56-57). It concluded that the tolls were out of line with costs and that petitioner had failed to comply with its mandatory statutory duty to prescribe new tolls.

Having determined the merits of the case, the Court of Appeals passed to the jurisdictional issues. It held that under the statutory rate-making scheme, petitioner's activities were predominant and those of the President negligible, and that, accordingly, petitioner's functions, not being those of a mere advisor to the President, were fully subject to judicial review. The court intimated that the courts could re-examine the rates even after their approval by the President, unless he actually changed the rates proposed to him by petitioner. In reaching this result, the court was influenced by the circumstance that petitioner is a Government corporation amenable to suit and engaged in activities similar to those of private business concerns (*infra*, pp. 30-31, 60).[46] With respect to the standing-to-sue issue, the court held that the Canal Zone Code and the Hay-Pauncefote Treaty, 32 Stat. (Pt. 2) 1903, conferred actionable rights on the plaintiffs; further, that the failure of the President and Congress to remedy the alleged misinterpretation by petitioner of the Canal Zone Code, although brought to their attention, did not permit an inference of ratification, but merely meant that the President and Con-

[46] In a similar vein, the court held that the decisions pursuant to which the inferior federal courts outside the District of Columbia lacked jurisdiction to maintain mandamus proceedings were inapplicable because petitioner is a corporation and thus subject to a mandatory injunction.

gress were too busy to give redress, and the courts remained open to give relief to the plaintiffs.

4. The Scope of the Decision Below and the Applications to Stay the Proceedings Pending Review in this Court

The decision of the Court of Appeals directed the District Court to enter summary judgment for respondents in accordance with its opinion (*infra*, p. 67). In that opinion, as we have just outlined, the Court of Appeals took the position that the tolls are substantially out of line with costs and petitioner's failure to prescribe new tolls constitutes an arbitrary refusal to comply with the statutory requirements of Section 412. Since then, the Court of Appeals has indicated unmistakenly that petitioner's compliance with its judgment must result in a very substantial lowering of the Panama Canal tolls.[47] In these circumstances, the District Court presumably will feel constrained to enter a judgment conforming very closely to respondents' prayer for summary judgment.[48]

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[47] The memorandum of the Court of Appeals denying a stay of mandate, pending application to this Court for a stay of judgment, stated:

> Motion denied. *In view of the heavy accumulating loss to plaintiffs by defendant's failure to perform what this Court holds to be its legal obligation* and of the ease with which it can seek interim relief from the Supreme Court or a justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice.
>
> (S.) CHARLES E. CLARK
> (S.) CARROLL C. HINCKS
>
> Dated: April 30, 1957 [Emphasis added.]

[48] *Supra*, p. fr. 43, pp. 16-17. Respondents' expectation that an order of this scope will be entered is disclosed by their (Consolidated) Memorandum in Opposition to Petitioner's Application for Stay: The judgment will undoubtedly direct that the toll rate be

Upon motion made in this Court, Mr. Justice Harlan ordered a stay of all further proceedings under the mandate of the Court of Appeals.[49] Having evaluated the questions presented by this litigation as being of such a nature "that it cannot be said that it is unlikely that certiorari will be granted", he took cognizance of the far reaching effect of this litigation on the relations of the United States with foreign governments, and concluded that petitioner, as a Government instrumentality, should not be compelled to revamp its entire toll structure before its duty to do so, and the extent thereof, if any, were finally adjudicated. 1 L. Ed. (2d) 903, 904; 77 Sup. Ct. 854.

REASONS FOR GRANTING THE WRIT

By directing petitioner to prescribe new and lower tolls for the Panama Canal, the court below has injected itself into a most significant area of intra-governmental relations, seriously disturbing the proper balance of authority and power between the three departments of the Government, as well as disrupting the basic functioning of the Canal. At the same time, the ruling directly affects this country's relations with the many other nations which are interested in the great waterway linking the Atlantic and Pacific Oceans. Under the holding of the Court of Appeals, petitioner may be compelled to propose tolls so low

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proposed on a basis of Canal activity only and without absorption of the business losses as that point was expressly ruled on by Court of Appeals [*infra*, pp. 56-57]. *Respondents will confidently argue that it also provides for the allocation formulae used by the General Accounting Office in the light of the provisions of the Government Corporation Control Act.* * * * (p. 14)." (Emphasis added.)

[49] The Court of Appeals issued its mandate although advised of the pendency of an application to a Justice for a stay.

that the President ultimately will have to disapprove them. This, in turn, may cause most serious embarrassment in our relations with foreign countries. Petitioner believes that it would be dangerous, undesirable, and wasteful if it were to prescribe new tolls before its duty to do so had been determined by the highest judicial authority.

In reaching its result, the court below disregarded the pertinent decisions of this Court and of other Courts of Appeals holding to a minimum judicial interference in these sensitive areas. It also held by necessary implication that a Government corporate agency has the ministerial duty to comply with, and the courts are bound by, the position taken by the Comptroller General in an audit report prepared under the Government Corporation Control Act, even if Congress and the President do not accept the recommendations contained in that report. This novel interpretation of the Government Corporation Control Act raises important questions of federal law which should also be settled authoritatively by this Court.

I

A. The decision below is in conflict with constant judicial holdings that the administration of federal public property, such as the Panama Canal, is subject to congressional, not judicial, control, and with the correlative rulings that a private citizen has no standing to complain of an alleged violation of the law in that limited area.

Respondents' claim [50] is based on Sections 411 and

[50] Cf. Complaint, par. 3 (Pl. App. 2a); affidavit in support of motion for summary judgment par. 3 (Pl. App. 16a).

412 of Title 2 of the Panama Canal Code which are concerned with the administration of, and the condition under which the public may use, the Panama Canal which is property of the United States. The authority to enact these sections thus rests on Article IV, Section 3, of the Constitution pursuant to which Congress has the power to make all needful rules and regulations respecting the property of the United States. Statutes enacted under this authority are not considered to be "of a legislative character in the highest sense of the term (Art. 4, § 3) 'but savor somewhat of mere rules prescribed by an owner of property' ". *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U.S. 119, 126. Since Congress is considered to have here not merely the status of legislator but also that of a proprietor,[51] it is established that the administration of these statutes is subject to congressional, not judicial, control. *Alabama* v. *Texas*, 347 U.S. 272, 273; *United States* v. *San Francisco*, 310 U.S. 16, 29-30; *Light* v. *United States*, 220 U.S. 523. See also *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931 (C.A. D.C.), certiorari denied, 350 U.S. 884, holding that where, under a statute involving the disposition of Government surplus electricity, Congress, as here, reserved control over those activities through the power of making annual appropriations.[52] the congressional supervision was exclusive and judicial review precluded.

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[51] *United States* v. *Midwest Oil Co.*, *ibid.*; *Light* v. *United States*, 220 U.S. 523, 536.

[52] Under Sections 102-104 of the Government Corporation Control Act, 59 Stat. 598, 31 U.S.C. 847-849, petitioner's budget has to be approved by Congress and the expenditures for operating and administrative expenses have to be appropriated annually.

It follows that an individual does not have standing to complain either of the alleged violation of a statute concerning the administration of public property (*Perkins* v. *Lukens Steel Co.*, 310 U.S. 113) or of the violation of a treaty obligation assumed by the United States with respect to such property (*Skiriotes* v. *Florida*, 313 U.S. 69, 72-74). Statutes or treaties in this area are in the nature of "a self imposed restraint for violation of which the Government—but not private litigants can complain", and are "not intended to be a bestowal of litigable rights upon those desirous" to use the public property. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127.

In other words, any duty created by the Canal Zone Code is owed to the petitioner's "superior executive and legislative authority" (310 U.S. at 129) and not to respondents. Noncompliance with the terms of the Code does not violate any duty owed to respondents, and, conversely, it does not invade any legal right of theirs. Any financial loss to respondents resulting from the alleged violation by petitioner of Sections 411 and 412, accordingly, is *damnum absque injuria* and does not confer upon them standing to obtain judicial redress. *Perkins* v. *Lukens Steel Co.*, *supra*, at 125; *Stark* v. *Wickard*, 321 U.S. 288, 304.[53]

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[53] Congress, of course, can confer a judicial remedy upon a person merely financially affected by administrative action. *Associated Industries* v. *Ickes*, 134 F. 2d 694, 702 (C.A. 2), vacated as moot, 320 U.S. 707; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 934, fn. 20 (C.A. D.C.), certiorari denied, 350 U.S. 884. See also Defense Production Act Amendments, 1952, Title III, Section 301, 66 Stat. 308, 41 U.S.C. 43a, granting judicial review to the determinations of the Secretary of Labor involved in *Perkins* v. *Lukens Steel Co.* In contrast to a remark in the decision below (*infra*, p. 64), the 1952 statute fully recognized, rather than overruled, the legal principles embodied in the *Perkins* case.

The Administrative Procedure Act has not relaxed the standing-to-sue requirements in the area here involved, *i.e.* that of non-regulatory administrative activities which do not affect any of respondents' specific rights.[54] Under Section 10(a) of the Administrative Procedure Act (Def. App. 4a), a person has standing to seek judicial review (a) if he suffers "legal wrong because of any agency action," *i.e.*, if a specific legal right of his or a legal duty owed to him has been violated,[55] or (b) if he is "adversely affected or aggrieved by such action within the meaning of any relevant statute." The second clause does not constitute an abandonment of the "standing" requirement by permitting anyone to obtain judicial review of every agency action on the bare allegation that it somehow prejudices him economically.[56] This reading of the Act has been specifically rejected because it "would in effect delete from Section 10(a) the phrase 'within the meaning of any relevant statute.' That view, of course, cannot be accepted". *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924, 932 (C.A. D.C.), certiorari denied, 350 U.S. 884.

The Court of Appeals for the District of Columbia

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[54] Cf. Senator McCarran's explanation of the pertinent sections of the Act on the floor of the Senate, quoting with approval the statement of the Department of Justice to the effect that Section 10(a) of the Administrative Procedure Act "reflects existing law" as stated in *Alabama Power Co. v. Ickes*, 302 U.S. 464, and *Perkins v. Lukens Steel Co., supra*; 92 Cong. Rec. 2153; *Legislative History of the Administrative Procedure Act*, S. Doc. 248, 79th Cong., 2d Sess., p. 310.

[55] *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924, 932 (C.A. D.C.), certiorari denied, 350 U.S. 884.

[56] Inasmuch as the standing requirement has its roots in the limitation of the jurisdiction of the federal courts to actual "cases" (Art. III, Section 2), it is doubtful whether Congress constitutionally could confer such broad review powers on the courts. Cf., *e.g.*, *Stark v. Wickard*, 321 U.S. 288, 304.

Circuit, the appellate court primarily responsible for the day-by-day development of federal administrative law, has interpreted Section 10(a) to refer to situations where *regulatory*[57] administrative action, directed at the plaintiff, either violates a legal right of his or adversely affects him economically. Accordingly, it has consistently held that judicial review is available to a suitor only where an administrative agency has taken regulatory action, or engaged in a "legislative declaration of rights" (cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 424), or where a statute provides for judicial review.[58] *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932-934 (C.A. D.C.), certiorari denied, 350 U.S. 884; *Benson* v. *Schofield*, 236 F. 2d 719, 722-723 (C.A. D.C.), certiorari denied, 352 U.S. 976; *Iowa-Illinois Gas & Electric Co.* v. *Benson*, No. 13570 (C.A. D.C.), decided February 28, 1957, now pending on petition for a writ of certiorari, No. 1036, October Term, 1956.[59] The holding below also constitutes a departure from the earlier decision of the Sec-

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[57] For the distinction between legislation resting on Article IV, Section 3 of the Constitution and statutes regulating private business and employment, see, also, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128, and the concurring opinion of Danaher, J., in *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 511 (C.A. D.C.), certiorari denied, 350 U.S. 1002.

[58] The Canal Zone Code does not contain any express or implied provision for judicial review; on the contrary, judicial review is explicitly denied by the provision that any change in tolls is subject to the approval of the President whose action in such matter shall be final and conclusive." *Supra*, p. 10.

[59] The petition in the *Iowa-Illinois Gas & Electric Co.* case seeks to raise only the narrow question of whether the Administrative Procedure Act confers the right to obtain judicial review of the legality of a loan to a third party made under the Rural Electrification Act. It specifically disclaims any intention to rely upon any grounds, other than the Administrative Procedure Act, to support its claim of standing to sue (Pet. in No. 1036, p. 2). The Government, while recognizing that the general philosophy of the

ond Circuit in *Associated Industries* v. *Ickes*, 134 F. 2d 694, vacated as moot, 320 U.S. 707.[60]

If the new position of the Second Circuit were to be accepted, the consequences of the broadening of the standing-to-sue concept would be momentous. This enlargement would not be limited to the Panama Canal tolls but would generally require the courts to reexamine all the fees and rates charged by any federal agency or Government corporation for the use of Gov-

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Court of Appeals for the District of Columbia Circuit is basically inconsistent with the decision of the court below in the instant case, insofar as Section 10 of the Administrative Procedure Act is concerned, is opposing certiorari on the ground that the decision in the *Iowa-Illinois* case is so clearly correct and is in such accord with controlling precedents that it needs no review by this Court. Moreover, the factual situations in the two cases are entirely different.

[60] The court below also based respondents' standing on the suggestion contained in Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 152, that a "litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts". However, even if petitioner were a private utility, mandamus would not lie to compel it to reduce allegedly excessive tolls. At common law, the user of a utility charging excessive rates could bring an action for damages or reparations, *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436; however, as the same decision points out, this common law remedy is superseded by the modern regulatory legislation such as Sections 411 and 412, which is considered exclusive unless the common law remedy is expressly reserved (204 U.S. at 446, 447), see also *Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 177; *Central Kentucky, etc., Co.* v. *Railroad Commission*, 290 U.S. 264, 271-273. And it is significant that the court below denied respondents' reparation claim. *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C.A. D.C.), referred to below (*infra*, p. 65, fn. 36), based the consumer's right to obtain judicial review of an adverse decision of a public utility commission on the fact that the statute expressly provided for this remedy. The decision recognized that, absent this statutory grant, the consumer, being merely financially affected, would have lacked standing. 151 F. 2d at 613-614.

ernment property, services, or credit facilities. The decision below thus constitutes a drastic departure from the basic judicial attitude that the courts will not "interfere with the manner in which the Government may dispatch its own internal affairs". *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 129.

B. The ruling below also conflicts with the decisions of this Court and of the Courts of Appeals that the judiciary will not review or compel administrative action which is in the nature of advice to the President. In *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, this Court held that it could not review an order of the Civil Aeronautics Board which, like a change in the Panama Canal tolls, required the approval of the President. The reasons which led to this result were that administrative action which requires presidential approval is not final, hence, that review would be premature (333 U.S. 112-113); that such administrative action usually involves delicate, complex and technical matters and large elements of prophecy for which the judiciary has neither the aptitude, facilities, qualifications or responsibility (333 U.S. at 111);[61] and, finally, that the unrequested interposition of the courts between the President and his advisers would constitute an advisory opinion in its most obnoxious form (333 U.S. at 113). See also *Upde-*

[61] Even in the absence of a requirement of Presidential approval, administrative determinations of this type would not normally be subject to judicial review. *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U.S. 585, 598; *Williamsport Wire Rope Company* v. *United States*, 277 U.S. 551, 559, 561; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 567-568; *United States* v. *George S. Bush & Co., Inc.*, 310 U.S. 371, 380; *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 303; *Stark* v. *Wickard*, 321 U.S. 288, 310. See also *Employers Group, etc.* v. *National War Labor Board*, 143 F. 2d 145, 151 (C.A. D.C.).

graff v. Talbott, 221 F. 2d 342, 346 (C.A. 4); *United States Overseas Airlines v. Civil Aeronautics Board*, 222 F. 2d 303 (C.A. D.C.).

The court below seeks to distinguish the letter of the *Waterman* case from the one at bar; it stands, however, in irreconcilable conflict with the spirit of that decision. First, the Court of Appeals took the position that petitioner is the primary rate-maker and that the President has a far more subordinate position than he has under the Civil Aeronautics Act. The Panama Canal legislation does not support that proposition. The 1950 Act did not detract from the President's authority held by him since 1912 to make the final determination as to a change in canal tolls. According to Section 411 (*supra*, pp. 2-3):

> * * * changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matters shall be final and conclusive.

The import of the 1950 statute was to afford the President a group of advisors, *i.e.*, the officers and other personnel of the Panama Canal Company, more expert in the field of canal toll rate-making than the Army officers had been (*supra*, p. 9). But the ultimate responsibility for decisions involving the consideration of the potential impact of the proposed rates upon national and international trade, national transportation policy,[62] as well as foreign policy and treaty obligations,[63] remained with him. The status of petitioner's

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[62] H. Doc. 460, 81st Cong., 2d Sess., pp. 11, 16.

[63] Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 81st Cong., 2d Sess., on H.R. 8677, pp. 43, 86-87.

directors, who serve at the pleasure of the President's designate (*supra*, p. 7), certainly is less significant than that of the members of an independent commission, such as the Civil Aeronautics Board.

In its attempt to distinguish this case from *Waterman*, the court below also held that petitioner's refusal to prescribe new tolls constituted "a decision which has finality and is certainly effective without any approval by the President" and consequently constituted a final order reviewable by the court (*infra*, pp. 58-59). The supposed finality of the failure to prescribe rates, however, is not a sufficient distinction because *Waterman* is based only to a limited extent upon the consideration that the administrative action was not consummated prior to the presidential approval. In any event, considering the complete control the President has over petitioner's board of directors, it cannot be said that petitioner's refusal to act is final. If the President feels that petitioner's failure to act constitutes a breach of its statutory duties, he most decidedly can compel petitioner to act. Indeed, as we have suggested, the President's position with respect to petitioner is much stronger than in the case of an independent regulatory commission such as the Civil Aeronautics Board.

C. Throughout the decision below runs the notion that in this case the scope of judicial review is somehow broadened, and a departure from established precedent justified, because petitioner is a corporation engaged in business activities and subject to suit. (Cf. pp. 45, 46, 54, 60, 63, 64, 65, 67.) This argument ignores the fact that petitioner is an agency and instrumentality of the United States administering federal property. It also disregards the holdings of this Court that, as far as the Federal Government is

concerned, it is not permissible to distinguish between governmental and non-governmental activities and that all the activities of validly created Government corporations are of a governmental nature. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 102; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U.S. 466, 477; *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 523-524.

In this respect, the decision below is directly inconsistent with *N. Y. ex rel. Rogers* v. *Graves*, 299 U.S. 401, 406-408, which held that petitioner's corporate predecessor, the Panama Railroad Company, was a federal instrumentality engaged essentially in government business.[64] The Court of Appeals also failed to follow the teaching of *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-384, which establishes that the Government cannot simply be treated as if it were a private litigant even where it engages—either directly or through a Government corporation—in business activities analogous to those usually conducted by private enterprise.[65]

II

In its rulings on the merits of respondents' claim for mandatory relief, the decision below runs counter

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[64] That case was decided in 1937, *i.e.*, at a time when the Panama Railroad Company was still a New York corporation (cf. *supra*, p. 6, fn. 10). Since then, the Panama Railroad Company has been reincorporated under federal law and been charged with the maintenance and operation of the Panama Canal. Its business aspects thus have been vastly diminished by the legislation of 1948 and 1950.

[65] The circumstance that petitioner may sue and be sued, of couse, only means that the courts have jurisdiction over petitioner's person. It does not entail the bestowal upon the courts of jurisdiction over the subject matter of any and all types of complaint that might be filed against petitioner.

to all the rules governing the grant of mandamus, unless the decision is based upon the court's unexplained and tacit assumption that the Comptroller General's report was binding upon petitioner. This assumption is without any legal foundation, and in any event, it raises an important question of federal law not previously determined by this Court.

A. The Court of Appeals held—erroneously, as we believe we have established—that the District Court had incorrectly dismissed the complaint for lack of jurisdiction; it also went on to direct that summary judgment should be entered for respondents to the extent set forth in, and in accordance with, its opinion. The opinion held (at pp. 56-57, *infra*) that petitioner had construed the statute improperly, that its tolls were to be based exclusively on the bare cost of maintaining and operating the Panama Canal without regard to the cost of the indispensable supporting business operations, and that petitioner was not justified in exercising its business judgment with respect to future contingencies (*supra*, p. 19, *infra*, pp. 57-58).

1. The first error was the direction for entry of summary judgment in this posture of the case. Petitioner had moved to dismiss for lack of jurisdiction, and the District Court had ruled that it would consider only that motion; it had stayed all other proceedings. *Supra*, pp. 16-17. In these circumstances, and relying upon this ruling of the District Court, petitioner submitted merely a short affidavit in support of its motion to dismiss for lack of jurisdiction. It did not answer respondents' voluminuous motion for summary judgment because it was not *sub judice*, and because the need for such answer might be obviated by the expected jurisdictional ruling of the District Court. The

granting of respondents' motion for summary judgment by the Court of Appeals thus deprived petitioner of all opportunity to controvert the facts raised by the motion.[66] This constituted plain error. *Fountain* v. *Filson*, 336 U.S. 681, 683; *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, 768 (C.A. 7), aff'd, 342 U.S. 916.

2. The award of mandatory relief to respondents is likewise in serious disagreement with the pertinent decisions of this Court. The court below overruled petitioner's interpretation of the statute under which it operates in spite of that court's own admission that petitioner's position was "reasonable from the naked words" (*infra*, p. 53). This was done in the face of the well-established rule that mandamus does not lie where the case involves the interpretation of a statute

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[66] The fact that petitioner's motion to dismiss for lack of jurisdiction was supported by an affidavit did not transform it into a cross-motion for summary judgment. Motions under Rule 12(b) (1)-(5) and (7) always could, and as a matter of fact usually have to, be made in the form of a speaking motion. The provision of Rule 12(b) which transforms a speaking motion into a motion for summary judgment is limited in terms to motions under Rule 12 (b)(6), the old speaking demurrer. Moore, *Federal Practice* (2d Ed.), Vol. 2, Section 12.09; pp. 2247-2257. Petitioner thus did not admit the allegations of respondents' motion for summary judgment by its failure to traverse them. Nor did petitioner's arguments that respondents lacked standing to sue and that mandamus did not lie (because the duty to prescribe new tolls involved matters entrusted to petitioner's discretion and judgment), go to the merits of the controversy. The standing issue, predicated on the existence *vel non* of a "case" within the meaning of Art. III, Section 2 of the Constitution, necessarily goes to the jurisdiction of the court. And it is well settled that the question as to whether the official has discretion or an absolute duty goes to the jurisdiction of the court to grant mandamus and not to the merits. *Marbury* v. *Madison*, 1 Cranch 137, 170; *Decatur* v. *Paulding*, 14 Pet. 497, 515-517, and see the concurring opinions of Baldwin and Catron, J. J. at 518 and 523; *U.S. ex rel. Dunlap* v. *Black*, 128 U.S. 40, 48; *Work* v. *Rives*, 267 U.S. 175, cf. *Keim* v. *United States*, 177 U.S. 290.

unless the official's or agency's interpretation thereof is "clearly erroneous" or the matter is beyond "peradventure clear." *United States ex rel. Chicago Great Western R.R. Co.* v. *Interstate Commerce Commission*, 294 U.S. 50, 61-63; *Wilbur* v. *United States*, 281 U.S. 206, 218-219. An apparently "reasonable" interpretation of a statute may be erroneous, but it cannot be said that it is "clearly erroneous" or that the matter is "not free from doubt."[67]

In overruling petitioner's methods of cost allocation and its exercise of business judgment in refusing to lower tolls in the presence of considerable potential increases in the cost of operations, the court disregarded the rule going back to *Marbury* v. *Madison*, 1 Cranch 127, 170, and *Decatur* v. *Paulding*, 14 Pet. 497, 515, that the courts do not have jurisdiction to interfere with the exercise of the very duty and discretion entrusted to the officer and agency. *Wilbur* v. *United States*, 281 U.S. 206, 218.[68] And to the extent that the

[67] A comparison of those parts of the District Court opinion dealing with the issue of statutory interpretation (Pl. App. 170a-181a) with the corresponding portions of the decision below demonstrates that the position taken by petitioner is anything but "clearly erroneous". It is, of course, our position that petitioner's interpretation of the statute is correct. This appears from the use in Section 411 of the words "authorized to prescribe and from time to time change", derived from the 1912 statute which concededly had conferred absolute discretion on the President. The holding of the court below that Congress intended the canal to operate at cost disregards Canal Zone Code, Title 2, Sections 246(d), 253, 255 (Def. App. 8(a), 13a, 20a-21a) pursuant to which excess funds not needed for authorized plant replacement and expansion are to be paid into the Treasury as dividends. Congress thus expected petitioner to recover more than the mere cost of operations.

[68] This is not the situation in which a court compels action by an agency which had refused to take any action whatsoever (cf. *Interstate Commerce Commission* v. *Humboldt S.S. Co.*, 224 U.S. 474; *Wilbur* v. *United States*, 281 U.S. 206, 218; *Virginian Ry.* v.

decision requires petitioner, not merely to determine whether new rates should be prescribed, but to prescribe new and reduced tolls in accordance with the court's interpretation of the law and facts as set forth in the opinion, the decision departs from the consistent rule that while a court may direct an agency to exercise its discretion it lacks power to control or guide the exercise of this discretion. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 551; *Wilbur* v. *United States*, 281 U.S. 206, 218.[69]

System Federation No. 40, 300 U.S. 515, 551). Under the statutory plan, the first public act to be performed by petitioner is the publication in the Federal Register of its proposal to change rates. This is preceded by petitioner's continuous observation and evaluation of the toll rates on the basis of cost, traffic and revenues (*supra*, p. 11) and the determination based upon those factors whether or not the tolls should be changed. Petitioner is constantly performing those functions (*supra*, p. 11) and its determination not to propose new rates is not based upon inaction but on the exercise of its judgment and discretion. The decision below and respondents' demand for judgment (*supra*, fn. 43, pp. 16-17) go far beyond merely compelling administrative action; they seek to direct and control the exercise of petitioner's judgment and discretion and to reverse petitioner's decisions based on the exercise of discretion and judgment that no changes in the rates are indicated and necessary at present. Cf. *Wilbur* v. *United States*, *ibid.* and *Virginian Ry.* v. *System Federation No. 40*, *ibid.*

[69] The holding that the lower federal courts outside the District of Columbia have jurisdiction to issue writs of mandamus (pp. 66-77) is in conflict with decisions of this Court such as *McIntire* v. *Wood*, 7 Cranch 504; *Rosenbaum* v. *Bauer*, 120 U.S. 450; *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.*, 197 U.S. 536; *Covington and Cincinnati Bridge Co.* v. *Hager*, 203 U.S. 109; and with the recent decisions of the Courts of Appeals including *United States ex rel. Vassel* v. *Durning*, 152 F. 2d 455 (C.A. 2); *Insular Police Commission* v. *Lopez*, 160 F. 2d 673, 677 (C.A. 1); *Petrowski* v. *Nutt*, 161 F. 2d 938 (C.A. 9), certiorari denied, 333 U.S. 842; *Marshall* v. *Crotty*, 185 F. 2d 622, 627 (C.A. 1); *Biggs* v. *Ward*, 212 F. 2d 209, 211 (C.A. 7); *Updegraff* v. *Talbott*, 221 F. 2d 342, 436 (C.A. 4). The argument that lack of jurisdiction does not extend to mandatory injunctions is inconsistent with the decisions holding the man-

In accepting respondents' contention that the statutory formula required the prescription of lower tolls, and in affording an authoritative judicial interpretation of the statutory formula in advance of any proposal of new rates by petitioner and before the ensuing public rate hearings, the Court of Appeals also violated the traditional principle that courts may only review final determinations and may not render advisory legal opinions. *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114, and the authorities there cited.

Finally, the court ignored the decisions holding that mandamus does not issue as of course but is awarded only in the exercise of sound judicial discretion on the basis of equitable principles. *Duncan Townsite Co.* v. *Lane*, 245 U.S. 308, 311-312; *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 95-96; *United States* v. *Dern*, 289 U.S. 352, 360-361; *Whitehouse* v. *Illinois*, 349 U.S. 366, 373. The court failed to take into consideration the highly relevant factors that the Comptroller General did not find any equities in respondents' position; he considered the statutory cost formula, as construed by him, to be technically defective, leading to consequences

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damus and mandatory injunctions are governed by the same considerations and that the latter cannot be used in order to circumvent the District Court's lack of jurisdiction to issue original writs of mandamus. *Miguel* v. *McCarl*, 291 U.S. 442, 452; *Smith* v. *Bourbon County*, 127 U.S. 105, 112; *Warner Valley Stock Co.* v. *Smith*, 165 U.S. 28, 33; *Stevenson* v. *Holstein-Friesian Ass'n*, 30 F. 2d 625, 626 (C.A. 2); *Youngblood* v. *United States*, 141 F. 2d 912, 913 (C.A. 6). If *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515 constitutes a departure from this rule, the Court of Appeals for the First, Fourth, Sixth, Seventh, and Ninth Circuits and until recently the Second Circuit itself, apparently have not interpreted it to that effect, and the law is in need of clarification.

Since respondents' Secretary has his office in the District of Columbia, mandatory relief is available in appropriate cases.

which are economically and financially unsound, resulting in a subsidy to respondents at the expense of taxpayers which Congress never intended to grant; and he recommended the immediate correction of the cost formula.[70]

B. The complete departure of the decision below from the accepted standards governing the exercise of mandamus powers becomes understandable only on the basis that the court, *sub silentio*, accepted respondents' theory (*supra*, p. 16) that the Comptroller General's audit reports are conclusively binding upon the courts and upon petitioner, which is subject to the absolute and ministerial duty to comply with them. This, too, was significant error.

The policy of the Government Corporation Control Act is "to bring Government corporations and their transactions and operations under annual scrutiny by the *Congress*, and provide current financial control thereof" (emphasis added). Government Corporation Control Act, Section 2, 59 Stat. 597, 31 U.S.C. 841. This annual scrutiny is obtained by the preparation by the several Government corporations of business-type budgets annually submitted to the Bureau of the Budget (Section 102, 31 U.S.C. 847). This budget, as usual

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[70] *Supra*, pp. 12-13. One of respondents' spokesmen, while testifying before a congressional committee, had to concede that while the Comptroller General agreed with their legal conclusions he did not support the "moral" result and did not consider respondents' position to be morally correct. Testimony of Robert E. Mayer, President, Pacific American Steamship Association, in *Changes in the Administration of the Panama Canal*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess. on H.R. 6917, etc., p. 21.

ified, amended, or revised by the President, is transmitted to Congress as part of the Annual Budget (Section 103, 31 U.S.C. 848). Congress in turn considers the budget programs of the corporations and enacts the necessary appropriations so as to make the corporate funds available for expenditures or to limit the use thereof as Congress may determine (Section 104, as amended, 31 U.S.C. 849).

The presidential and congressional scrutiny of the Government corporations is facilitated by the annual audit of their financial affairs by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporated transactions (Section 105, 31 U.S.C. 850). The Comptroller General reports on this audit to Congress, and copies of this report are to be furnished to the President, the Secretary of the Treasury, and the corporation concerned. The report includes among others "such *comments and information* as may be deemed necessary to keep Congress informed of the operations and financial condition of the several corporations together with such *recommendations* with respect thereto as the Comptroller General may deem advisable * * * " and show specifically "any program, expenditure or other financial transaction or undertaking * * * which, *in the opinion* of the Comptroller General, has been carried on or made without authority of law." (Section 106, 31 U.S.C. 851 (emphasis added)).

The purpose of the Comptroller General's report thus is to make *comments* and to give information to keep Congress advised, to *make recommendations*, and to show activities which in the Comptroller General's *opinion* are illegal. Not a word permits the inference that these reports are binding upon an administrative

agency and judicially enforceable at the suit of private individuals in a situation, where as here, Congress has failed to implement the Comptroller General's views.[71]

Indeed, the legislative history of these audit provisions makes it clear that their sole purpose is to inform and to make "pertinent recommendations" to Congress[72] and they are not designed to interfere with, or bind, the activities of Government agencies or instrumentalities. This limited scope of the commercial audit provisions was highlighted from the very beginning when they were proposed as an amendment to the George Act[73] which transferred the activities of certain financial agencies from the Department of Commerce to the Federal Loan Agency.[74] When Senator Byrd introduced the commercial audit provisions on the floor of the Senate, the following colloquy occurred:

> Mr. George: And it [the commercial audit amendment] can be administered without undue interruption of the corporate functions of the various loan agencies?
>
> Mr. Byrd: The amendment does not cover. I will say to the Senator from Georgia, any question involving the making of loans except to re-

[71] There is no relation whatever between an audit report made under the Government Corporation Control Act, and a report upon the settlement of public accounts certified under the authority of Section 304 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. 74.

[72] S. Rept. 694, 79th Cong., 1st Sess., p. 9; H. Rept. 856, 79th Cong., 1st Sess., p. 8.

[73] Approved February 24, 1945, Section 5, 59 Stat. 6.

[74] Both reports supporting the Government Corporation Control Act point out that the commercial audit provisions contained in it merely restate without substantial change the audit provisions of the George Act. S. Rept. 694, 79th Cong., 1st Sess., p. 7; H. Rept. 856, 79th Cong., 1st Sess., p. 7.

port to Congress any loans illegally made, but does cover the auditing of loans after they are made.

Mr. George: It simply covers the auditing?

Mr. Byrd: Yes; it does not give the Comptroller General the right to deny the making of loans, but anything that is done that may be of an illegal character, in the opinion of the Comptroller General, will be reported to the Senate. [91 Cong. Rec. 687].

Statutory language and legislative history thus both refute respondents' theory, accepted by the court below, that where Congress and the President fail to take any action with respect to the recommendations contained in the Comptroller General's Audit Report, the Government corporation, nevertheless, is subject to the ministerial duty to comply with it, and that "the courts are open"[75] to enforce this supposed absolute

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[75] *Infra*, p. 65. As a matter of fact, the failure of the President and Congress to compel compliance with the Comptroller General's report has not been caused by the fact that they were too "busy" but by their disagreement with the Comptroller General's conclusions. When advised of the pendency of this action, a member of the House Committee on Appropriations (Representative Thomas) took the position that the shipping interests were fighting a preventive war, that they were suing for $27 million while they should be paying $50 million more. Representative Miller considered it unrealistic that the Canal rates had not been increased since 1937 and that they were lower than those of the Suez Canal. *Hearings on the Department of Commerce and Related Agencies Appropriations for 1957*, House of Representatives, 84th Cong., 2d Sess., pp. 691, 696-697. Actually, Congress exercises intimate and detailed control over petitioner. Cf., *e.g.*, the congressional directive referred to *supra*, p. 11; for other instances, cf. H. Rept. No. 1345, 83rd Cong., 2d Sess., p. 12; S. Rept. No. 1373, 83rd Cong., 2d Sess., p. 26. H. Rept. No. 603, 84th Cong., 1st Sess., p. 10; and H. Rept. No. 2076, 84th Cong., 2d Sess., p. 10; S. Rept. No. 2039, 84th Cong., 2d Sess., p. 7; H. (conference) Rept. No. 2344, 84th Cong., 2d Sess., pp. 3, 6, showing the control exercised

obligation without the taking of any further evidence, at the suit of any person who stands to gain financial advantage thereby. To the contrary, since petitioner's duties with respect to the canal tolls are owed exclusively to "superior executive and legislative authority" [76] the failure of Congress and the President to follow up the Comptroller General's criticism is final.

CONCLUSION

The broad question underlying this litigation is whether the tolls for the Panama Canal are to be determined by petitioner and the President to whom these functions were assigned by statute, or by the Comptroller General, or the courts. This question is of far reaching public importance and should be authoritatively determined by this Court. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys.

JULY 1957.

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by Congress, and the assurances given by defendant to Congress, in connection with the planned abandonment of the Panama Railroad.

[76] *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 129; see *supra*, p. 24.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 111

October Term, 1956

(Argued November 13, 14, 1956. Decided April 8, 1957.)

Docket No. 24226

GRACE LINE, INC., ET AL., PLAINTIFFS-APPELLANTS,

and

NATIONAL BULK CARRIERS, INC., ET AL., INTERVENING PLAINTIFFS-APPELLANTS,

v.

PANAMA CANAL COMPANY, DEFENDANT-APPELLEE.

Before: CLARK, *Chief Judge,* and FRANK[1] and HINCKS, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge.*

Grace Line, Inc., and eleven other United States flag shipping lines, suing on behalf of all users of the Panama Canal, together with certain intervening plaintiffs, appeal from a dismissal, D. C. S. D. N. Y., 143 F. Supp. 539, for want of jurisdiction, of their complaint seeking to compel Panama Canal Company to prescribe tolls as required by recent congressional legislation and to recover damages for its past failure

[1] Judge Frank heard arguments in this case, but died before this opinion was prepared.

to do so. Reversed and remanded for a judgment for plaintiffs as stated.

C. DICKERMAN WILLIAMS, of Maclay, Morgan & Williams, New York City (J. Stewart Harrison, of Brobeck, Phleger & Harrison, San Francisco, Cal., and William I. Stoddard, of Maclay, Morgan & Williams, New York City, on the brief), *for plaintiffs-appellants and intervening plaintiffs-appellants.*

GEORGE COCHRAN DOUB, Asst. Atty. Gen., Washington, D. C. (Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Paul A. Sweeney and Herman Marcuse, Attys., Dept. of Justice, Washington, D. C., and Benjamin H. Berman, Atty. in Charge, Admiralty & Shipping Section, Dept. of Justice, New York City, on the brief, *for Panama Canal Company, defendant-appellee.*

Brief by JAMES M. ESTABROOK, New York City, as *amicus curiae* in support of plaintiffs-appellants.

CLARK, *Chief Judge:*

This appeal concerns the power of a federal district court to compel the government corporation which operates the Panama Canal to set tolls according to the new formula established by Congress in 1950 and to repay canal users several million dollars damages for excess tolls charged. It raises interesting and important questions as to judicial responsibility and authority when administrative action is dilatory or lacking.

A class action by canal users seeking this relief ended in summary judgment for the defendant below, when Judge Walsh concluded that he lacked jurisdiction over the subject matter and over an indispensable party. In brief, he interpreted the 1950 statute [2] as giving the defendant discretion to defer use of the new formula and denying judicial review of the defendant's decision. The history of toll regulation in the canal illuminates the conflicting interpretations of the most recent statute.

From 1912 to 1948 two different government bureaus operated commercial enterprises in the Canal Zone. Under 1902 legislation the President owned all the stock of Panama Railroad Company, a corporate ancestor of the present defendant which ran a railroad, a shipping line, and miscellaneous ventures. After 1912 there also existed The Panama Canal, an unincorporated agency headed by a governor whom the President appointed. This agency administered the civil government of the Canal Zone and operated the canal itself.

The President had statutory authority to fix canal tolls at his discretion between 75 cents and a dollar per laden ton, and a formula was worked out by the President, the Treasury Department, and the governor whereby tolls would be set high enough to cover operating expenses of the canal, "interest," and the cost of civil government in the Canal Zone. Canal users protested that the cost formula was unfair to them, and in later years tolls were set much lower than the formula would have required. As expenses rose, the toll rate required by the formula became greater than

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[2] Act of Sept. 26, 1950, 64 Stat. 1038, amending Title 2, §§411, 412, of the Canal Zone Code, approved June 19, 1934, 48 Stat. 1122. The Canal Zone Code does not constitute a part of the United States Code.

the statutory maximum of $1.00, while the toll remained constant at 90 cents a laden ton.

Meanwhile Panama Railroad Company, which bore very little of the burden of government in the Canal Zone, continued its highly profitable operations, returning a surplus to the Treasury. The corporation made no financial reports to Congress and was not supervised by the Bureau of the Budget or the General Accounting Office. In 1948 to obtain greater financial supervision Congress reorganized the defendant's predecessor under federal law as a government corporation,[3] subjecting it to the requirements of the Government Corporation Control Act of 1945.[4] Henceforth it was required to keep books in the fashion of a commercial business for annual submission to Congress after Presidential revision, and it was to be audited periodically by the General Accounting Office, which, in turn, reported to Congress.

The same year President Truman announced a rise in canal tolls to $1.00 per laden ton to meet continuing deficits from The Panama Canal. When the shipping industry responded with severe protests the increase was deferred pending study by congressional committees and the Bureau of the Budget. A three-cornered struggle developed. The railroads wanted to prevent what they considered a subsidy to shipping—operation of the canal below "cost." The Bureau of the Budget wanted increased revenue from the canal operation and better bookkeeping procedures. The shipping lines wanted revision of the formula for determining "costs" of the canal to enable the canal to be "self-sustaining" without greatly raising tolls.

The resulting compromise is the statute now before us. Ownership of the physical properties of the canal

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[3] Act of June 29, 1948, 62 Stat. 1075.

[4] 59 Stat. 597, 31 U. S. C. §§841-871.

was transferred from the governor's agency to the defendant corporation, now rechristened Panama Canal Company, which was to be operated by its board of directors like a commercial business, dealing with other government agencies on a business footing and meeting its expenditure from its own income. The cost of civil government in the Canal Zone was to be borne by the defendant, in lieu of taxes; and this cost was to be apportioned among the various business enterprises equitably, thus relieving the former heavy burden on the canal operation. As part of the new scheme, toll-making authority was transferred from the President to the defendant, and the statutory maxima and minima were removed. Tolls were to be set to cover costs, which were defined by statute for the first time; and the new cost formula was made more favorable to canal users than the previous informal arrangement of the President, the Treasury Department, and the governor.[5]

Both Congress and the President retained some control over toll-fixing. The annual budget reports to Congress and the periodic GAO audits required under the Government Corporation Control Act would henceforth cover the operation of the canal, now that it, too, was run by the defendant. The President retained the power to appoint the members of the defendant's board of directors, and no change in tolls could be made without his approval.

For three years after passage of the Act the defendant submitted its annual budgets to Congress, reporting a profit from its combined operations, but not allocat-

[5] The major changes were that interest during construction was no longer included in capital investment; costs of civil government were no longer borne almost exclusively by the canal users; interest was reduced to commercial rates; and military vessels were to pay for their transits. A proposal to allocate half the cost of the canal to national defense was rejected.

ing the cost of interest or civil government among its various enterprises.[6] No objections were taken to these budgets by Congress and no steps were taken by the defendant to change toll rates. The present controversy began in 1955 when the General Accounting Office completed its audit of the defendant and reported:

> "* * * * The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government and administrative and other general expenses) to the activity operating results reported by the Company. * * *
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> "The analysis of the Company, reported net income of $13,000,000 for 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. * * *
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> "* * * * Thus the net income from the canal activity is being used to offset losses from business activities.
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> "* * * * We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412(b). Based on the financial results of the canal activity for the

[6] Defendant's annual reports for the fiscal years ending June 30, 1952, 1953, and 1954, were attached as exhibits to an affidavit submitted by the plaintiffs. Criticism of the defendant's reports is detailed in the Comptroller General's Audit Report to the Congress of the United States on Panama Canal Company and Canal Zone Government for the Fiscal Year Ended June 30, 1955, 29-30 (hereafter cited as 1955 Audit).

past 3 years, toll rates would have to be reduced substantially if hearings were held at this time."[7]

The GAO attributed the loss from other business activities to inefficient management, reapportionment of the burden of civil government, and a diminished market for the goods and services of these enterprises.[8] The unexpected profit of the canal operation probably stems from the steady increase in foreign commercial volume since 1947.[9] The General Accounting Office did not believe that existing legislation authorized the defendant to continue recovering business activity losses through canal tolls and unsuccessfully sought amendment of § 412(b) of the 1950 Act to accomplish that end.[10]

Judge Walsh rejected the General Accounting Office's construction of the 1950 amendments, which the plaintiffs support, and approved that of defendant Panama Canal Company. We turn first to this question of statutory interpretation.

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[7] Report on Audit of Panama Canal Zone Government for the Fiscal Year Ended June 30, 1954, 2-3.

[8] 1955 Audit, 34-36.

[9] In the four years after the transfer of the canal to the defendant, foreign toll revenues rose from $16,935,823 to $23,442,170 per year, while American tolls went from $9,986,708 to $10,407,307. 1955 Audit, 3.

Congress had recognized that future tolls would depend on the volume of traffic, *e.g.*, Sen. Rep. No. 2531, 81st Cong., 2d Sess., 5 (1950), but had not anticipated a rise in volume of such proportions. Shipping line representatives had testified that American commercial volume was declining, while government spokesmen pointed out that the total volume of commercial shipping had gone up sharply in the past year. Hearings before the Subcommittee on Maintenance and Operation of the Panama Canal of the Senate Committee on Armed Services, 81st Cong., 2d Sess. 16, 20, 39 (1950).

[10] 1955 Audit, 1-4, 19.

I. Meaning of the 1950 Statute.

A. *Statutory Text.* The old and new versions of §§ 411 and 412 are printed in the margin for comparison, since the first phase of argument concerns the significance of the changes in wording adopted in 1951.[11]

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[11] "Chapter 23.—Tolls for Use of Canal

"411. Authority [of President] to Prescribe [and Change] Measurement Rules and Tolls.—The [President] *Panama Canal* Company is authorized [subject to the provisions of the section next following] to prescribe and from time to time change *(1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [, but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.] *: Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice by publication in the Federal Register, of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States whose action in such matter shall be final and conclusive.*

"412. Bases of Tolls [; Maximum and Minimum Rates].—*(a)* Tolls on merchant vessels, army and navy transports, colliers, *tankers,* hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules] *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft shall be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessels with passengers or cargo. [In addition to the tolls based on measurement or dis-

The defendant views § 411 as controlling and finds great significance in the use of the verb "authorizes," which it contrasts with the mandatory word "shall," found in other parts of the statute.[12] The plaintiffs

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placement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article *III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and* XIX of the convention between the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes shall not include any interest during construction."

[12] And see, *e.g.*, *U. S. ex rel. McLennan* v. *Wilbur*, 283 U. S. 414, 418, 420; *U. S. ex rel. Simons* v. *Hines*, D. C. Cir., 69 F. 2d 229. But see *Supervisors* v. *United States*, 71 U. S. 435, 4 Wall. 435, 445-447; *United States Sugar Equalization Board* v. *P. De Ronde & Co.*, 3 Cir., 7 F. 2d 981, 985-986, certiorari dismissed 271 U. S. 691.

reply that § 411 merely identifies the person delegated with toll-fixing power and prescribes the procedure, while the obligation to set tolls according to formula flows from § 412, where the mandatory language is found.

Defendant next points to the retention in § 411 of the words "prescribe and from time to time change" which were also used in the earlier version of the statute conferring discretionary power on the President. From this we are asked to infer that similar discretionary power is to be exercised by the new authority. Plaintiffs reply that the old scheme was only discretionary within the statutory limits and that on occasion the President sought congressional approval even for changes within these limits.[13] They also cite the first section of Article III of the Hay-Pauncefote Treaty of November 18, 1901, restricting Presidential discretion by the requirement that all tolls be "just and equitable."[14]

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[13] In 1937 confusion over the statutory definition of tonnage led President Roosevelt to appoint a committee, which recommended revision of §412 to provide for measurement rules. Sen. Doc. No. 23, 75th Cong., 1st Sess. On August 24, 1937, the committee's recommendation was enacted by Congress, 50 Stat. 750, and the President revised tolls accordingly three days later. Presidential Proclamation No. 2248, 2 Fed. Reg. 1765-1774.

[14] "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

"1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable." 32 Stat. 1903. The treaty is incorporated by reference into § 412(d), Tit. 2, of the Canal Zone Code.

The transposition of the phrase "subject to the provisions of the section next following" to modify the word "change," instead of the word "authorized," indicates to the defendant that the mandatory provisions of § 412 were applicable only when and if changes in tolls were attempted. Plaintiffs however contend that the transposition, if at all significant, meant only that toll-making was subject to § 412, while the rules for measuring vessels were not. The plaintiffs also say that another part of the statute making the legislation effective as of the time when the President transferred the canal to the corporation [15] answers the defendant's claim that §§ 411 and 412 fail to specify when the formula should go into effect, thus indicating discretion to delay utilizing the new scheme.

Finally, the defendant draws us to the proviso in § 411 that "the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section." But this may have been intended to continue the legal authority of the old tolls fixed by the President during the interregnum when the President was no longer authorized to promulgate tolls and his corporate successor had not yet promulgated any, and would not be inconsistent with plaintiffs' position.

Summing up, the defendant would read the two sections as governing any future effort to change tolls, but leaving it entirely up to the defendant when and if any changes should be attempted. The plaintiffs just as cogently glean from the language a requirement that once the properties of the canal are given to the defendant the new formula must be applied with rea-

[15] Act of Sept. 26, 1950, § 14, 64 Stat. 1043. The transfer occurred July 1, 1951. Exec. Order No. 10263, 16 Fed. Reg. 6333.

sonable speed. Both interpretations are reasonable from the naked words, and we must seek further for their meaning.

B. *Legislative History.* During the three-year legislative progress of the statute there was no discussion of the possibility that the new law would work out to mean a drop in toll rates which the defendant might be reluctant to announce. The universal assumption of legislators and lobbyists was that the new § 412 would authorize an increase in some amount,[16] which the defendant would announce as soon as the necessary computations were completed.[17] The shipping industry, for example, lobbied to place a $1.00 maximum on tolls, holding the rise to 10 cents a laden ton.[18] The old informal formula of the President, the Treasury Department, and the governor had long indicated that an increase was in order;[19] and since 1948 the President

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[16] Hearings, *supra* note 9, at 8, 15, 28; Hearings before the Subcommittee on the Panama Canal of the House Committee on Merchant Marine and Fisheries, 81st Cong., 2d Sess. 68, 141 (1950); Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950); 96 Cong. Rec. 13375, 14672 (1950).

[17] The Bureau of the Budget, which presented the bill which became law, expected the computations to take one year. A Report and Recommendations of the Bureau of the Budget, H. R. Doc. No. 460, 81st Cong., 2d Sess. 16 (1950), (hereafter, Bureau of the Budget Report); Hearings, *supra* note 16, at 48.

[18] *E.g.*, Hearings, *supra* note 16, at 76-82; Hearings, *supra* note 9, at 11-17. The proposal passed the House, but was rejected by the Senate Committee. Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950).

[19] The last time the old formula indicated the propriety of reducing tolls was in 1931, and the following year the formula was revised to remove the national defense write-off of some canal costs. Hearings, *supra* note 9, at 39. At the time the 1950 statute was passed, application of the old formula would have meant an increase of from 45 to 50 cents per ton. Hearings, *supra* note 9, at 7, 17, 24.

had been impatient to proclaim the maximum statutory toll.[20] The major concern was that the defendant might be required by rising costs to raise tolls to the point where the intercoastal shipping industry could no longer compete with the railroads,[21] and the statutory proviso that toll increases be approved by the President was designed to safeguard the ship lines in that eventuality.[22]

The scope of the defendant's discretion must therefore be inferred from the general scheme of regulation which Congress created. The major change was the transfer of toll-making authority from the President to a government corporation organized on commercial lines. This was coupled with abandonment of the old statutory maxima and minima in favor of a single requirement that tolls cover costs. The latter were carefully delineated by Congress for the first time. These changes together spell an intention to change toll-making from a political decision made by the President to an economic decision made by the defendant corporation.[23]

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[20] On March 26, 1948, President Truman proclaimed a toll rise effective in six months. Presidential Proclamation No. 2775, 3 CFR 30 (1948 Supp.). The effective date was postponed to March 1, 1949, September 1, 1949, March 1, 1950, and finally March 1 1951, while Congress considered the present statute; and upon passage of the present law the original announcement of an increase was revoked. Presidential Proclamation No. 2903, 3 CFR 56 (1950 Supp.), revoking Proclamations 2775, 2808, 2831, 2852, and 2875.

[21] Hearings, *supra* note 9, at 11, 14-16, 27, 36, 39; Hearings, *supra* note 16, at 67-69, 82-83, 102-125, 133-134, 142-152.

[22] Hearings, *supra* note 9, at 7; Bureau of the Budget Report at 17.

[23] *E.g.*, "If there is agreement as to the formula for establishing the toll rates and adequate business-type accounts and financial reporting, there is no sound reason for not delegating the rate-making function to the Company's Board of Directors, as has been done in the case of other Government corporations, such as TVA, which

A certain latitude was allowed the defendant in deciding how frequently to change tolls, but this was limited by the requirement that in the long run tolls must reflect *costs*.[24] Congress was expected to review these short-range decisions with the aid of the defendant's annual budgets, but neither Congress nor the defendant was authorized to ignore the statutory formula indefinitely for reasons of policy or convenience.[25]

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set the rates to be charged for their services." Statement of Harold Seidman, Accompanied by Russell Roane, Representing the Bureau of the Budget, Hearings, *supra* note 9, at 7, and Hearings, *supra* note 16, at 46. See also Bureau of the Budget Report at 16.

Throughout the hearings and debate it was assumed that, under the new law, tolls would be set by the defendant to make the canal self-sustaining, and there was virtually no mention of the President's veto power. Hearings, *supra* note 9, at 9, 11, 18, 27, 36; Hearings, *supra* note 16, at 54, 66, 68, 133, 139; 96 Cong. Rec. 13371-13380, 14671-14672.

[24] "The present basis of establishing tolls rates does not lend itself to the ready adjustment of rates, either up or down, to reflect increases or decreases in costs or changes in commercial conditions. * * * It is significant that the tolls rates have not been changed under this formula since 1938.

"* * *

"While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:

" 'Economic and commercial conditions are not static. The Panama Canal is a facility for the service of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.' " Bureau of the Budget Report at 16.

Congress recognized the possibility that in the long run the new formula might require reduction of tolls. Bureau of the Budget Report at 16; Hearings, *supra* note 9, at 18, 36; Hearings, *supra* note 16, at 139; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950).

[25] Hearings, *supra* note 16, at 49-50.

This last power was given the President, apparently to protect the American shipping industry.[26] Exercise of the Presidential veto was hardly discussed during the legislative history of the Act, and the apparent assumption of all concerned was that as a general rule the defendant's rate changes would become law. It was clear to Congress that the Hay-Pauncefote Treaty forbade discrimination against foreign vessels, so that any Presidential veto of rate increases would have to subsidize not only American lines, but the foreign lines, which comprised more than half the canal's commercial volume.[27]

That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. Although the cost formulae of the other ventures were not spelled out in the statute, each enterprise was expected to be self-sustaining[28] and the annual commercial-style budget of the defendant corporation was expected to facilitate congressional scrutiny of the various operations. Until the GAO audit the defendant's ambiguous bookkeeping concealed the fact that the Treasury was being deprived of profits made in operating the canal, so that consumers of goods and services furnished by the other ventures could enjoy them below cost—the very type of subsidy the Government Corporation Control Act and the 1951 amendments to the Panama Canal Act were designed to prevent. The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give

[26] Notes 21, 22 *supra*.

[27] Hearings, *supra* note 9, at 13, 23; Hearings, *supra* note 16, at 67, 146-147; 96 Cong. Rec. 13373-13379.

[28] Bureau of the Budget Report at 14; Hearings, *supra* note 9, at 8, 18-19, 22; Hearings, *supra* note 16, at 66-67, 74; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950); H. R. Rep. No. 2935, 81st Cong., 2d Sess. 3 (1950).

the defendant's board of directors carte blanche to ignore the statutory mandate whenever the defendant's other business ventures were losing money.

We conclude that Panama Canal Company was expected to propose changes in tolls for Presidential approval whenever it became apparent that tolls were substantially out of line with costs. While it was given discretion to defer propsals of change for short periods of time where it believed the discrepancy between costs and revenue was due to a temporary factor, it could not delay such proposals unreasonably long.

II. Defendant's Asserted Discretion to Delay

Defendant contends that, even if it was required to propose changes with reasonable frequency, it has been justified in delaying action until an appraisal of the property was completed, without which depreciation and interest could not be accurately estimated.[29] The appraisal has now been finished and further delay cannot be justified on that ground.[30] It further suggests that the Korean War, pending legislation to alter § 412, and the 1955 treaty with Panama have introduced "uncertainty rendering it unwise to change tolls at the present time." It has been five years since the new formula went into effect and almost two decades since the tolls were last changed. Uncertainty has become the norm in world affairs. The legislative policy is to make tolls reflect changes in these uncertainties, and not to suspend all changes until world conditions become static;[31] further delay is not an ex-

[29] The defendant gives as its reason for not promulgating new tolls on its estimate of the property's value: "In view of the policy that tolls should remain stable over a period of years, it is evident that Congress did not intend tolls to be determined upon so tenuous and temporary a basis." Defendant-Appellee's Brief, p. 42.

[30] *Id.* p. 43.

[31] See note 24 *supra*.

ercise of the defendant's conceded discretion to determine the frequency of toll changes, but an arbitrary refusal to obey the mandatory requirement of § 412 that tolls be set in accord with costs.

III. Judicial Review of Administrative Non-Action

We thus reach the question of judicial review. Judge Walsh stated his conclusion that such review was not intended by Congress in several ways: failure to join the United States as an indispensable party; no standing to sue; inability to compel a government officer to exercise his discretion by writ of mandamus; and lack of finality in the defendant's action, which is subject to Presidential revision. On appeal defendant also suggests that a district court outside the District of Columbia lacks power to issue writs of mandamus, and that courts should not review the management of the public domain.

There is nothing in §§ 411 and 412 expressly authorizing or expressly precluding judicial review. Unless constitutional limitations exist, our power to grant relief in the premises is a matter of congressional will; and these various doctrines only point up relevant factors in our search for the silent legislative intent. We turn first to the problem of Presidential revision.

Defendant states, and we agree, that we have no power to review government decisions which are not final, and that tolls proposed by the defendant, but not yet approved by the President, lack the requisite finality. *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103; *Pan American Airways Co. v. C. A. B.*, 2 Cir., 121 F. 2d 810. In this suit, however, we are concerned not with proposed rate changes, but with the defendant's refusal to make such proposals—a decision which has finality and which is certainly effective without any approval by the

President. The defendant's refusal to start the machinery for toll changes is like a court's refusal to start the process of adjudication by granting a defendant's motion to dismiss a complaint. Such a decision is a final order, although the opposite decision, denying the motion, would not be.

From the cases of *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, *supra*, 333 U.S. 103, and *Pan American Airways Co.* v. *C. A. B.*, *supra*, 2 Cir., 121 F. 2d 810, the defendant argues that, where Congress establishes an agency whose decisions require Presidential approval, all judicial examination of the agency's action or inaction is precluded. But the cases will not support so broad a proposition. Both those cases dealt with the construction of § 1006 of the Civil Aeronautics Act, 49 U.S.C. § 646, which authorizes judicial review of certain orders of the Civil Aeronautics Board; and the decision of this court and the Supreme Court was that the section did not authorize review of Board orders granting or denying citizen carriers' applications for certificates of convenience and necessity to engage in overseas and foreign air transportation. Justice Jackson, writing for the Supreme Court majority, did not state the sweeping proposition now urged to us, but listed the factors which led him to conclude that § 1006 was not meant to include review of that type of agency decision: (1) Congress had expressly precluded judicial review of foreign carriers' applications to engage in foreign or overseas routes, suggesting a similar policy toward domestic carriers' applications of the identical kind; (2) air commerce, by virtue of its third dimension, novelty, and danger, poses special problems not present in the regulation of ship, truck, or train transportation; (3) aerial navigation routes and bases must be correlated with national defense plans and the conduct

of foreign relations; (4) the express scheme for review of CAB decisions was to permit it where the Board performed conventional functions and to preclude it where the Board inverted the usual administrative process and acted as adviser to the President; (5) the President's role in the statutory plan was to coordinate legislative and executive powers to further the commercial, strategic, and diplomatic interests of this country in the realm of foreign affairs.

None of these considerations are present here. The defendant is a government corporation, expressly made suable on all its decisions without reservation. The subject matter being regulated—marine transportation—is familiar to the courts, as is the process of rate-making. The defendant's decisions are not complicated by factors of diplomacy or national defense, since the Hay-Pauncefote Treaty forbids use of the canal toll-rate as a weapon of foreign policy. Accordingly the defendant's decisions will not involve national defense data and secret foreign intelligence, as was the case under the Civil Aeronautics Act.[32] The CAB's standard of "convenience and necessity" was much more vague than the formula expressed in § 412 to which the defendant corporation is to be held; and the type of CAB decisions discussed by the Supreme Court concerned the rate of expansion of the air transport industry, rather than, as here, the price to be paid by consumers to a government monopoly for services of a type frequently supplied by a public utility.[33]

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[32] *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U. S. 103, 111-112. Unlike the present law, the statute before the Supreme Court provided that CAB decisions "shall be submitted to the President before publication thereof." 49 U. S. C. § 601.

[33] At the time the present statute was passed the most comparable waterway was the Suez Canal, then privately-owned. The tolls policy in Suez was frequently compared with that in Panama. Hearings, *supra* note 9, at 34, 37; Hearings, *supra* note 16, at 69-70.

It may be significant that review was sought in the case before the Supreme Court at a much later stage than here. There "submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public and that which was made public and which is before us is only the final order and opinion containing the President's amendments and bearing his approval." *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, *supra*, 333 U. S. 103, 110. It may well be that no judicial review would be possible once the defendant's original proposal has been altered to conform with the President's political decision,[34] but that question is not now before us.

Panama Canal Company claims that we cannot now ignore the question, however, since it would be irresponsible to mandamus the defendant to action which would then be beyond judicial scrutiny. Assuming that this is true, it appears that in the normal situation tolls would be set by the defendant and approved by the President without alteration; there would then be no obstacle to court review. Although, on occasion, the President may intervene and thus preclude judicial review of the new rates, the mere possibility of frustration should not deprive the district court of the power to take the first step. See *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Wilbur* v. *U. S. ex rel. Kadrie*, 281 U. S. 206, 218.

135, 137-138, 142; 96 Cong. Rec. 13373; and the international treaty incorporated in § 412 (d) of the present statute was modeled on that governing the Suez Canal. See note 14 *supra*.

[34] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 112-114; but see *Shaughnessy* v. *Pedreiro*, 349 U. S. 48.

Nor is the defendant a mere adviser to the President of the type discussed in *United States* v. *George S. Bush & Co.*, 310 U. S. 371—a decision under the Tariff Act of 1930 (46 Stat. 590). The Act authorized the Tariff Commission to recommend increases in the statutory import duties if existing duties failed to equalize production costs of foreign and domestic articles. A recommendation to increase the duty on canned clams was approved by the President with the statutory finding that "in his judgment such rates of duty are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Court of Customs and Patent Appeals, authorized to review "a question or questions of law only," held the increase invalid because in computing the cost of Japanese production the Commission and the President converted yen into dollars at the 1932 rate of exchange, instead of the rate of earlier years before Japan went off the gold standard. The Congress had deliberately failed to specify the year on which exchange rates should be computed, and the President's method of solving the problem was held nonreviewable by the Supreme Court. "Whatever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production." *United States* v. *George S. Bush & Co., supra*, 310 U. S. 371, 379. The Court carefully limited its language to tariff acts, where for a century the President had been given wide discretion to make such decisions; and it noted that the Tariff Commission had traditionally acted as an adviser only, either to Congress or to the President. The differences between the back-

ground, subject matter, and language of the tariff statute and the present law dispel any inference that Congress intended the same scope of review for canal users as for importers of foreign commodities.

Even assuming the scope of review under that statute and this one to be the same, we think the Supreme Court would have allowed the Court of Customs and Patent Appeals to act in the event the Tariff Commission, like the present defendant, boldly refused to hold any hearings concerning rate changes despite adequate indications that changes were necessary to comply with the statutory formula. The present case would be more comparable to the *Bush* decision if the present plaintiffs were trying to declare new tolls invalid because of the type of depreciation computation chosen by the agency and approved by the President.

Before 1950 the President was authorized to set tolls, and the epithet "adviser" could properly be applied to the governor of The Panama Canal. But if the changes in § 411 are to have any meaning the defendant is now the rate maker, and not a counselor. The legislative history similarly supports this.

As a last resort the defendant presses on us cases involving administration of the public domain;[35] but the problems presented by them are far removed from those of a government corporation, organized on a commercial model, charging consumers for the type of services ordinarily supplied by private enterprise. Moreover, the public domain cases have no factor anal-

[35] *E.g., United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *Alabama* v. *Texas*, 347 U. S. 272, 273; *United States* v. *San Francisco*, 310 U. S. 16, 29-30; *Light* v. *United States*, 220 U. S. 523, 537. *Cf.* Section 4 of the Administrative Procedure Act exempting from some rule-making requirements "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts," 60 Stat. 238, 5 U. S. C. § 1003.

ogous to the treaty—the Hay-Pauncefote Treaty, *supra*—which here binds the government to conduct its venture in a fashion that will provide fair and equitable tolls for users of all lands. Compare *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128, 129, which the defendant cites.

The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court. See, *e.g.*, *Honorich* v. *Chapman*, D. C. Cir., 191 F. 2d 761 (Secretary of the Interior's regulations concerning Indians' wills); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (Attorney-General's listing of organizations for use in screening government personnel); *Shachtman* v. *Dulles*, D. C. Cir., 225 F. 2d 938 (passport denial); *Textile Workers Union of America* v. *Allendale Co.*, D. C. Cir., 226 F. 2d 765 (Walsh-Healey Act determinations reviewable under the Fulbright Amendment, 66 Stat. 308, 41 U. S. C. § 43a, which overruled *Perkins* v. *Lukens Steel Co.*, *supra*, 310 U. S. 113); Administrative Procedure Act, 5 U. S. C. § 1009(c), "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." We think the intent of Congress was to allow judicial review in these circumstances.

Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. § 1009(a), confers standing on persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute," and the plaintiffs can point to the Panama Canal Act of 1912, as amended in 1951, as well as the Hay-Pauncefote Treaty, as their statutory authority. Moreover, without legislation they have a right to judical redress, since the corporation's action in charging tolls in excess of the

statutory rate was "of a sort that, if taken by a private person, would create a right of action cognizable by the courts." [36] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 152 (concurring opinion of Justice Frankfurter).

Here there is no controversy over the proper person to sue; all users of the canal have been joined in a single class action. The question is rather whether or not there is to be judicial review, since a finding of no standing here means that the courts have no power in the premises. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 186 (concurring opinion of Justice Jackson). From all that has gone before we conclude that court relief was not precluded and that the plaintiffs may seek it.

A final argument is made that legislative and executive supervision is sufficient and that judicial interference will prove cumbersome. The President's power to remove members of the defendant's board of directors and his veto power are stressed in this connection, as well as the supervisory power wielded by Congress through annual appropriation bills. But identical balances and checks rein most government agencies whose decisions are nevertheless subject to judicial scrutiny. For the person unable to get redress from the busy legislature or White House the courts remain open.

IV. The United States as Indispensable Party

The holding that the United States was an indispensable party applies, as we understand the opinion

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[36] The right of a consumer to sue a utility which charges excessive tolls is established, *e.g.*, *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *United States* v. *Public Utilities Commission of District of Columbia*, D. C. Cir., 151 F. 2d 609; *Richman* v. *Consolidated Gas Co. of New York*, 114 App. Div. 216, 100 N. Y. S. 81, affirmed 186 N. Y. 209, 78 N. E. 871.

below, only in so far as the plaintiffs seek to recover money from the defendant, and not to the request for injunctive or mandamus relief. We do not pass on the necessity for joining the United States as defendant, since we think a money recovery is precluded by other considerations. Restitution of overcharges would require determination of the tolls that should have been set. Although the district court might reconstruct the tolls which the defendant coporation should have promulgated, there is no way of knowing whether or not the President would have approved them. Moreover, there is no statutory authority for utilizing the defendant's facilities for measuring the amount of money to be awarded the plaintiffs in suits to recover overcharges. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 253-255. We find no evidence of a congressional intent to allow recovery of overcharges.

V. Availability of the Remedy of Mandatory Injunction

Panama Canal Company's last argument rests on the doctrine that federal courts outside the District of Columbia lack statutory authority to issue writs of mandamus against government officers in the exercise of their original jurisdiction. *McIntire* v. *Wood*, 11 U. S. 504, 7 Cranch 504; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & M. S. R. Co.*, 197 U. S. 536; *Covington & C. Bridge Co.* v. *Hager*, 203 U. S. 109. The lower federal courts have not been consistent in handling efforts to avoid this doctrine by actions for mandatory injunctions or declaratory judgment;[37] but we need not review those cases, since the *McIntire* line of cases is inapplicable to an action like the present one

[37] See Note, 38 Col. L. Rev. 903 (1938).

against a corporation. *Virginian R. Co. v. System Federation No. 40, supra*, 300 U. S. 515, affirming 4 Cir., 84 F. 2d 641, 646. The present situation is even more favorable for issuing a mandatory injunction, since by congressional legislation the defendant was made suable in New York, rather than in the District of Columbia.

We conclude that the judgment of dismissal for the defendant should be reversed and summary judgment should be entered for the plaintiffs on their motion therefor to the extent set forth in, and in accordance with, this opinion.

Reversed and remanded for judgment for the plaintiffs.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 8th day of April, one thousand nine hundred and fifty-seven.

Present: HON. CHARLES E. CLARK, Chief Judge; HON. CARROLL C. HINCKS, Circuit Judge.

GRACE LINE, INC., ET AL., PLAINTIFFS-APPELLANTS

v.

PANAMA CANAL COMPANY

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded for judgment for plaintiffs in accordance with the opinion of this Court; with costs to the appellant.

A. DANIEL FUSARO,
Clerk.

PANAMA CANAL COMPANY

Balboa Heights, Canal Zone

OFFICE OF THE PRESIDENT

June 1, 1955.

The Honorable Joseph Campbell, Comptroller General of the United States.

Dear Mr. Campbell:

After review of the report on the audit of the Panama Canal Company and Canal Zone Government for fiscal year 1954, I feel that I should communicate to you directly my views on the two new recommendations to Congress contained in the report. Those recommendations are (1) that a specific plan for liquidating the investment of the United States Government in the Panama Canal Company be incorporated into the basic legislation, and (2) that the formula for establishing toll rates be amended to include the recovery of losses sustained by the Company in the operation of business activities.

In reference to the first recommendation, as the report points out, the Company's charter now places on the Board of Directors the responsibility to appraise annually its working capital requirements, together

with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof. Such "dividends" are treated as applicable to reduction of past or future Government capital contributions for interest purposes.

The first new recommendation in the 1954 report would withdraw this authority by requiring annual payment into the Treasury of an amount at least equal to the depreciation and amortization for the year. The recommendation appears to be premised on the assumption that the Board of Directors has failed to pay into the Treasury funds in excess of its working capital requirements and reasonable foreseeable requirements for plant replacement and expansion. A second and somewhat inconsistent premise is that the Company should be required to pay into the Treasury all funds in excess of working capital requirements and obtain annual appropriations for plant replacement and expansion.

The propriety of the action taken to date by the Board of Directors in this connection appears to be amply supported by the Budget estimates for 1956 which project a cash deficiency in that year. It now appears that the Company's retained funds will not be sufficient to finance necessary capital improvements in fiscal year 1957, and appropriations for that purpose will probably be required in that year.

The whole purpose of the 1951 reorganization was to place the affairs of the Company on a corporate basis as distigmuished from the procedures applicable to so-called spending agencies of the Government operating with appropriated funds. The requirement that appropriations be obtained to finance all major plant replacement and expansion would in effect reverse the objective of the reorganization and to a large degree

withdraw management of the corporation from the Board of Directors. Adequate control of capital expenditures is maintained by Congress through annual review of the Company's budget program under the Government Corporation Control Act.

The second new recommendation in the 1954 report is that the formula for establishing toll rates be amended to include the recovery of "losses" sustained by the Company in the operation of business activities. This reference to "losses" in the so-called "business activities" as contrasted with a "profit" in the activities described as canal activities is misleading and creates a distorted picture of the results of operation since 1951. To arrive at the conclusion that such losses exist the report treats the canal operation and supporting activities as separate and asserts that the corporate charter now requires an allocation of general corporate expenses to each activity determined by an arbitrary fixed formula. The report does not specify any specific language of the statute requiring such allocation and the interpretation advanced by the report is contrary to the settled administrative construction by the agency charged with its administration. Furthermore the allocation of general corporate expenses in the manner suggested is at variance with our understanding of accepted principles of corporate accounting and management.

The enclosed paper prepared by my staff, in which I concur, explains the position of the Company in its construction of the corporate charter and outlines the basis for our nonconcurrence in this recommendation of the report.

Sincerely yours,

(Signed) J. S. SEYBOLD,
President.

Enclosure

COMMENT ON RECOMMENDATION OF GENERAL ACCOUNTING OFFICE REPORT FOR FISCAL YEAR 1954 FOR AMENDMENT OF FORMULA FOR ESTABLISHING TOLL RATES

The Panama Canal Company construes its charter as providing for a single operational mission—that of operating the Canal for the movement of ships from one ocean to the other. Supporting activities are maintained only to contribute to the performance of that mission, and tolls must be established at rates to cover the net cost of the entire operation. Some of the supporting activities are able incidentally to make sales or perform services for persons or organizations other than the users of the waterway. In these cases fair and reasonable prices are established with a view to recovering all direct costs and applying to general corporate expenses any recoveries over and above direct costs.

The part of the audit report that refers to "losses" in so-called business activities of the Company as contrasted with a profit in the Canal activity is misleading and creates a distorted picture of the results of operation since 1951. To arrive at this conclusion, the report treats the Canal operation and supporting activities as separate and independent with an allocation of general corporate expenses to each activity determined by an arbitrary fixed formula.

This process of allocation results in the conversion of costs into losses. Values or amounts allocated by an arbitrary formula diminished by the net operating balances are renamed losses. These same values applied to the fiscal structure of the Company as a whole produce a net return. The method suggested by the GAO inevitably implies lax management and incompetency. Few persons other than those familiar with

accounting practices of the Company would understand the process or comprehend its working.

The fixed allocation of general corporate expenses to supporting activities ignores the economic realities of the Canal enterprise and represents nothing more than an exercise in arithmetic. According to the report, the Company lost $5.4 million on non-Canal activities during the year and realized a net profit of $9.5 million on the Canal activity. Similar figures are developed in the report for the three-year period since 1951. The conclusion that non-Canal activities lost $5.4 million when in fact they contributed $4 million to general expenses and in addition bore a substantial amount of fixed operating costs such as depreciation that otherwise would have been charged to the Canal is difficult to understand.

An illustration may serve to disclose this fallacy. The Company's Industrial Division which operates a drydock and performs heavy industrial-type services, did $1,961,494 of outside business in 1954. According to analysis in the report, the Company lost $290,000 on this business. In fact, the business produced a contribution to general expenses of the Company of $282,921. In addition, if this business had not been obtained, it is estimated that the cost of work performed by the Division for the Company's own activities, primarily the Canal, aggregating $1,254,931, would have been increased by approximately $300,000. This external business, therefore, really produced a saving to the Company of more than $500,000 rather than a loss of $290,000 as computed in the report.

A somewhat similar analysis can be made for nearly every activity concerned, and the concept that the Company lost money through conducting them is at variance with the facts. If there had been no outside sales of collateral and supporting services during the

year, there would actually have been a net loss on the Canal activity alone for 1954 and not a net profit of $9.5 million.

Apart from general objections to the allocation method as a matter of sound business practice, there is no acceptable formula for the allocation of joint costs, and the percentage assigned to the various activities in the audit report fluctuates from year to year. For example, in allocating the cost of Canal Zone Government a basis was used which yielded percentages to Canal activities of 65, 63, and 55 percent for 1954, 1953, and 1952 respectively, but the use of another basis, which would provide 78 percent, is recommended on page 16 of the report.

Inevitably, the application of the allocation theory used in the audit report would result in a demand for unwarranted increases in prices charged by the supporting services. This will result in driving business away from these activities and reducing volume below the break even point, thereby leading to further demands for price increases which in turn would drive away more business. In such circumstances, allocation on a revenue basis would result in apportionment of more general corporate expenses to other activities, reflecting adversely on their results. In operating any activity, the pricing objective that will produce the greatest total benefit is that which will produce the maximum operating income *before* general corporate expense.

In the end, the audit report recognizes that under any circumstances amounts of general corporate expense not recovered by contributions from individual activities should be paid out of tolls. The report states, however, that this is not permitted by the law in its present form and recommends amendment to permit such financing.

The audit report does not point to any language of the present law requiring allocation of general corporate expenses. Instead the report states on page 5 that "the legislative hearings and reports of Congressional committees preceding the reorganization indicate the intention that the Company would be self-sustaining and the Canal and business activities would each bear its own costs of operation, including interest, depreciation, and an appropriate share of the net cost of Canal Zone Government." It is true that the statements of some of the witnesses during the hearings on the reorganization legislation, based on then current assumptions and forecasts, did express the view that each individual supporting activity would be self-supporting. But Congress, realizing the uncertainty of such projections, wisely did not write such a provision into the law and neither did it incorporate the requirement of allocation of any general or indirect expenses, other than the net cost of Canal Zone Government. Experience in operating under the reoganization legislation has fully justified the omission of such requirements, and it is recognized by all concerned that the allocation theory is unworkable.

We believe that the results obtained under the policies and practices adopted by the Company have clearly met the broad objectives of the reorganization legislation and are within the framework of the specific statutory requirements. As far as the effect upon the shipping industry is concerned, the results have been far better than the framers of the law had led the Congress to believe in their testimony. The Company has used the broad powers given to it by the law and exercised the flexibility of operating policy which the reorganization sought to bring into the enterprise. Methods of allocating costs between various classes of consumers, which were outlined by some of the wit-

nesses who testified during the hearings on the reorganization legislation, contemplated that much more could be recovered from Company-Government employees and other persons and agencies serviced by the Company in its collateral activities than has proven to be the case. This is due in part to changed economic conditions on the Isthmus and to lack at that time of adequate knowledge of market elasticity in certain areas. The Company has applied what it believes are sound business principles in meeting these changing economic conditions, and there is no question but what the results obtained from the Government's viewpoint more than justify the granting by the Congress of such operational authority to the Company.

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